(23,649)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 153.

LOUIS REINMAN AND LOUIS WOLFORT, PARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF REINMAN STABLES, REINMAN-WOLFORT AUTOMOBILE COMPANY, AND C. L. KRAFT COMPANY, PLAINTIFFS IN ERROR,

vs.

THE CITY OF LITTLE ROCK ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 10, 1914.

1 *Caption.*

Pleas.

Before the Honorable John E. Martineau, Chancellor of the Chancery Court, of Pulaski County, Arks., at its April term, A. D. 1912, on the 18th day of March, 1912, a day of said term in the following entitled action, to-wit:

14432.

L. REINMAN and L. WOLFORT, Doing Business under the Firm Name of Reinman Stables, Reinman-Wolfort Automobile Livery Co., and C. L. Kraft & Co., a Corporation Organized and Doing Business under the Laws of the State of Arkansas, Plaintiffs,

vs.

CITY OF LITTLE ROCK, CHARLES E. TAYLOR, as Mayor of the City of Little Rock; Fred M. Coggswell, as Chief of Police of the City of Little Rock, and W. M. Tweedy, as Police Judge of the City of Little Rock, Defendants.

2 In the Pulaski Chancery Court.

14432.

L. REINMAN and L. WOLFORT, Doing Business under the Firm Name of Reinman Stables, Reinman-Wolfort Automobile Livery Co., and C. L. Kraft & Co., a Corporation Organized and Doing Business under the Laws of the State of Arkansas, Plaintiffs,

vs.

CITY OF LITTLE ROCK, CHARLES E. TAYLOR, as Mayor of the City of Little Rock; Fred M. Coggswell, as Chief of Police of the City of Little Rock, and W. M. Tweedy, as Police Judge of the City of Little Rock, Defendants.

Complaint.

The plaintiffs L. Reinman and L. Wolfort state that as such Reinman Stables they maintain on the east side of Louisiana Street between Third and Fourth streets in the city of Little Rock in the State of Arkansas, a livery and sales stables business, conducted in a building of brick and mortar, and that they have maintained and operated said business at said locality for a period exceeding ten years last past, and that said locality and premises were used for such purposes for a period extending over twenty-five years preceding the time they began to conduct the said business at said place;
3 that for a long time they used the lots at the southeast corner of Louisiana and Third streets in said city and adjoining the premises last referred to for similar purposes, but when automo-

biles came into general use and demand, the demands of the business and its natural development required that they should install an automobile service, and that about four years ago, they together with other parties formed a company called the Reinman-Wolfort Automobile Livery Co. for this purpose, which carries on said business on said lots at the corner; that, for the sake of economy and the proper facilitation of business, and to avoid loss in management, said livery and sales stable business and said automobile business in a measure utilize one another's business, so that the entrance on Third street may sometimes afford ingress and egress for the said livery and sales stable business, and so that the premises of the said Reinman stables may be partly used by the said Automobile Livery Company for storage and repair.

That C. L. Kraft & Co. is a corporation organized and doing business under the laws of the State of Arkansas, and is located on Third street between Center and Louisiana street- in a building of brick and mortar, and is doing a general livery business, carefully and properly conducted in accordance with the rules and regulations of the Board of Health of the State of Arkansas, and that for a number of years last past said livery business has been conducted at said point without complaint as to sanitary conditions or the manner in which the same was kept.

4 That the said livery and sales stables business of Reinman Stables is and has always been located in the business section of said city of Little Rock, but not within its principal business district or shopping district, and that the locality where it is located aforesaid is occupied as follows; that is to say, upon the east side of Louisiana street, for the most part with small places of business devoted to negro traffic, and on the west side thereof is the same class of business, except where the lots are vacant; that there is very little business transacted upon Third street, either at said locality or anywhere in the neighborhood, except upon the corner of Main and Third streets, which is a shopping district; that Louisiana street and Third street at said point resemble the locality at the corner of Scott and Third streets, the said corner of Scott and Third street- being exempt from the ordinance hereinafter mentioned, which likewise is off the main business thoroughfare.

That your orators, during the progress of their said livery and sales stable business have been compelled to enter into leases for the grounds and improvements and for the purpose of part of the ground so occupied, and, to promote the same, have constructed a three-story brick building upon the said lots facing on Louisiana street at great cost to themselves, and for no other purpose can said building be used; that they use said building and premises in their livery and sales stable business, and that they have otherwise made large expenditures for improvements, and entered into obligations covering large sums to promote their said business, and that this

5 will be lost to them in large part, if not in whole, if they are compelled to abandon said site and cease to do business there; and that there is no other available site in said city where the said business can be profitably carried on, where plaintiffs have assurance that they may remain without molestation.

And your orators state that the matters above recited are for the most part and have been known to the said defendants, or could have been ascertained by them, and they say that the fact they were making such improvements was a matter of public notoriety at the time they were made, and they state that the said city encouraged for many years last past the establishment of said character of business at the said locality and in that vicinity, and on such encouragement these said buildings and expenditures were by plaintiffs made; and they aver that there is no material change in the situation as it has been all along for years and the present time, except that the care exercised by your orators has been constantly greater in preventing any improper deposits or smells to occur in connection with their business aforesaid, they using the most approved methods for cleanliness as such methods have become known.

That on the 1st day of September, 1911, the Gus Blass Dry Goods Co., the M. M. Cohn Co., Wolf Dry Goods Co. and the Little Rock Trust Co., having tried to buy the property of plaintiffs Reinman and Wolfort for business purposes for themselves and failing therein, brought suit in this court to suppress their said business as a nuisance
6 without allegation or proof that said business was not properly conducted, and on October 6th, 1911, said suit was by this court dismissed.

That on the 23rd day of October, 1911, the city council of the said city of Little Rock passed an ordinance whereby they provided that it should be unlawful for any person, firm or corporation to conduct or carry on a livery stable business within the following area: beginning at the intersection of Center street and Markham street, thence east on Markham street to Main street, thence south on Main street to Fifth street, thence west on Fifth street to Center street, thence north on Center street to Markham street, the place of beginning, and thereby denouncing a penalty of not less than fifty dollars and not more than one hundred dollars for each violation, each day any person, firm or corporation shall conduct or carry on a livery stable business within said district to be deemed a separate offense; that in addition the said city council by resolution has reserved the option not to issue a permit for the erection for livery stable purposes at localities beyond said district, and the effect of such action will be to give the said city council the option of saying whether or not any person shall, within any fixed limits, do such a business in said city.

Your orators hereto attach certified copies of the said ordinance and resolution, and make the same a part hereof.

Your orators state that said ordinance was procured to be passed by the Gus Blass Dry Goods Co., the M. M. Cohn Co., Wolf Dry Goods Co., and the Little Rock Trust Co. with others interested in the purchase of the property of your orators; that it was passed at
7 the same sitting, without notice to either of these plaintiffs, and is only in furtherance of the efforts of said parties to obtain the property of plaintiffs without due process of law or without the right of eminent domain.

The plaintiffs' buildings on which they have expended large sums

of money are unsuited by their construction to other business, and to remove them is in effect the taking of said plaintiffs' property without just compensation and without their day in court; that the method of fining provided is an effort to do indirectly under the guise of the police power what the city has not the right to do directly, viz: the confiscation of plaintiffs' property in violation of Section 1, Article XIV of the Constitution of the United States.

That further, plaintiffs do not know where to move, if a move is practicable; that there is even now pending before the city council of the city of Little Rock an ordinance to again define the limits for livery stables of a larger scope, and even intimation of a change from that all plaintiffs believe and charge aimed directly at them and them only.

That the action of the said city council in prohibiting the carrying on of a livery stable business at said locality on Louisiana street and permitting it to be carried on at said Scott and Third streets is discriminative and unreasonable and not warranted by law or any provision of the charter of the said city, and that the permit system adopted by said city, which leaves it uncertain where the said business can be carried on, is likewise unwarranted by law and is not sustained by any charter provision relating to said city.

That there is no provision in the charter of said city which
8 authorizes said city to pass any ordinance or to conduct said permit system, yet that your orators will be compelled by the mayor and the chief of police of the said city to yield thereto, and they will be denied any right to continue the said business at the present stand unless compelled to grant license therefor; that there never was any question about the granting of said license until the said ordinance was passed and said permit system was adopted.

That your orators have tried to obtain another location for their said business outside the said district, but they are unable to do so except at an extravagant outlay, which they are unable to make; that they would have done this, not because the action of said city was legal and proper, but because they did not wish to be harrassed and vexed by litigation and prosecutions in the police court of said city under the said ordinance; and they say that the said ordinance and permit system, each of them relegate the said business to a section of said city which is outside the business district where said business can be profitably carried on, and that the said part of the city is in or in close proximity to the residential part of said city; that as a rule livery stables are objected to by persons in the residential part of the city, and are not located there but are located in any part of the business district; that the effect of the said ordinance and permit system, and each of them, is to render the carrying on of the said business practically impossible; that your orators endeavored to keep the premises in a proper sanitary condition, and stand ready to adopt any additional measures for this purpose
9 which the court may direct; they aver that the said business, in drawing customers toward the locality where the said business has heretofore been carried on, largely contributed and contributes now to the activity of the said section as a business district, and creates custom for the business houses on said Main street.

That the defendant, Charles E. Taylor, is the mayor of said city of Little Rock, that F. M. Coggswell is chief of police of said city, and that W. M. Tweedy is police judge of the said city, and that the said city will, through its mayor, chief of police and police judge, endeavor to enforce said ordinance as well as said permit system unless restrained and enjoined from so doing by this honorable court, and will endeavor by the accumulation of large penalties and by other vexatious means to constrain your orators to close their said business and destroy the value of the same, and by this method take away their property and business without compensation or due process of law, oppressively, arbitrarily and in contravention of law.

Your orators, upon information and belief, aver that the said action of the said city of Little Rock and the said mayor and said chief of police is contrary to the provisions of Sections 2, 3 and 21, Article 11 of the Constitution of the State of Arkansas, which provide that no person shall be deprived of his property without due process of law, that all men are created equal and free, and have inherent and inalienable rights of acquiring, possessing and protecting property, and that the equality of all persons before the law shall forever remain inviolate.

That the said action of said city and said officers is in con-
10 travention to the provisions of the Fourteenth Amendment to the Constitution of the United States prohibiting any State or any city within the same from passing any law and enforcing the same where it is unequal, unreasonable or discriminative, or where it deprives a person of his property rights without compensation or due process of law.

That said city and said officers will attempt to enforce said ordinance on the 13th day of February, 1912, unless restrained by this honorable court.

Wherefore, your orators pray that said defendants and each of them be jointly and severally restrained from enforcing or attempting to enforce said ordinance or to carry out said permit system, either in person or by their representatives or other officers against your orators or their said business, and that they be restrained from endeavoring to vex and harrass your orators with proceedings for penalties under said ordinance, and that on final hearing the said order be made a perpetual injunction; and they pray for all costs, for proper process and all other relief in the premises to which they may be entitled under this bill in this honorable court.

WATKINS & VINSON,
MORRIS M. COHN,
Solicitors for Plaintiffs.

Indorsed and Filed February 12th, 1912. J. S. Maloney, Clerk.

11 L. Wolfort, being duly sworn according to law, deposes and says that he is one of the plaintiffs in the above entitled cause, and that the allegations in the above styled complaint are to the best of his information and belief true in each and every particular.

L. WOLFORT.

L. Reinman, being duly sworn according to law, says that he is one of the plaintiffs in the above entitled cause, and that the allegations contained in the above complaint are to the best of his knowledge and belief true in each and every particular.

Sworn and subscribed to before me by the said L. Wolfort and L. Reinman this 12 day of January, 1912.

[SEAL.] J. S. MALONEY, *Clerk.*

12 EXHIBIT "A."

Ordinance No. 1729.

An Ordinance to Regulate Livery Stables.

Whereas, the conducting of a livery stable business within certain parts of the City of Little Rock, Arkansas, is detrimental to the health, interest and prosperity of the City of Little Rock; therefore,

Be it Ordained by the City Council of the City of Little Rock:

SECTION 1. That it shall be unlawful for any person, firm or corporaton to conduct or carry on a livery stable business within the following area, to-wit: Beginning at the intersection of Center street and Markham street; thence east on Markham street to Main street; thence south on Main street to Fifth street; thence west on Fifth street to Center street; thence north on Center street to Markham street, the place of beginning.

SECTION 2. Any person, firm or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and shall be fined in any sum not less than Fifty ($50.00) Dollars, nor more than One Hundred ($100.00) Dollars for each violation, and each day any person, firm or corporation shall conduct or carry on a livery stable business within said limits shall be deemed a separate offense.

SECTION 3. This ordinance shall take effect and be in force
13 sixty (60) days after its passage.

Passed October 23, 1911.

Approved:

CHAS. E. TAYLOR, *Mayor.*

Attest:

GEO. A. COUNTS,
City Clerk.

14 *Demurrer to the Complaint.*

In the Pulaski Chancery Court.

14432.

L. REINMAN et al., Plaintiffs,
vs.
CITY OF LITTLE ROCK et al., Defendants.

Demurrer.

On this day come the defendants, by their attorneys, Harry C. Hale and J. W. & J. W. House, Jr., and demur to the complaint herein filed and for cause of demurrer state:

First. That the complaint does not state facts sufficient to constitute a cause of action.

Second. That the complaint does not state facts sufficient to show that this Court has jurisdiction over the subject matter.

Wherefore, defendants pray that the cause be dismissed and for such other and further relief as they may be entitled to.

HARRY C. HALE,
J. W. & J. W. HOUSE, JR.,
Solicitors for Defendants.

15 Pulaski Chancery Court.

14432.

L. REINMAN AND L. WOLFORT, Doing Business under the Firm Name of Reinman Stables; Reinman & Wolfort Automobile Livery Co., and C. L. Kraft & Co., a Corporation Organized and Doing Business under the Laws of the State of Arkansas, Plaintiffs,

vs.

CITY OF LITTLE ROCK, CHAS. E. TAYLOR, as Mayor of the City of Little Rock; Fred M. Coggswell, as Chief of Police of the City of Little Rock, and W. M. Tweedy, as Police Judge of the City of Little Rock, Defendants.

Decree.

Now on this day come the parties by their attorneys, and the defendants having heretofore filed their demurrer in short to the bill of complaint herein, on the ground that the said bill of complaint failed to state a cause of action, and did not state facts sufficient to entitle the complainants to the relief prayed therein, and the court having heard argument of counsel, and having taken time to consider of its judgment, upon the said demurrer, and the application for the temporary restraining order herein, and now being sufficiently advised in the premises.

It is ordered, adjudged and decreed that the said demurrer
16 be, and the same is hereby, overruled. And it is further decreed that the said defendants and each of them be, and they are hereby restrained and enjoined from enforcing or attempting to enforce against the said complainants the ordinance passed by the City Council of the said city of Little Rock, on or about the 23rd day of October, 1911, whereby it was provided that it should be unlawful for any person, firm or corporation, to conduct or carry on a livery stable business on the premises now occupied by the said complainants for livery stable purposes on Louisiana and also on Third streets, in said city of Little Rock, and they are further restrained from instituting any prosecution under said ordinances for any penalties therein set forth, or from attempting to enforce the said ordinance or any prosecution for any penalty thereunder, until the further order of this court. And the complainants are ordered to make and file an injunction bond in the usual form in the penal sum of Five Thousand ($5,000.00) Dollars, with surety satisfactory to the clerk of this Court. To which rulings the said defendants except.

3/18/12.

O. K.

J. E. M.

17 In the Pulaski Chancery Court.

14432.

L. REINMAN AND L. WOLFORT, Doing Business under the Firm Name of Reinman Stables, Reinman & Wolfort Automobile Livery Co., and C. L. Kraft & Co., a Corporation Organized and Doing Business under the Laws of the State of Arkansas, Plaintiffs,

vs.

CITY OF LITTLE ROCK, CHARLES E. TAYLOR, as Mayor of the City of Little Rock; Fred M. Coggswell, as Chief of Police of the City of Little Rock, and W. M. Tweedy, as Police Judge of the City of Little Rock, Defendants.

Answer.

On this day come the defendants, and in answer to the complaint herein state:

They deny that the plaintiffs carefully and properly conduct their business in accordance with the rules and regulations of the Board of Health of the State of Arkansas; they deny that for a number of years last past said livery business has been conducted at said point without complaint as to sanitary conditions or in the manner in which the same was kept.

Defendants deny that said livery and sales stable business of said plaintiffs is not within the principal business or shopping
18 district in the City of Little Rock, and they deny that there

is very little business transacted in this vicinity; but they state that said livery and sales business of said plaintiffs is conducted in the heart of the business district of the City of Little Rock.

Defendants deny that the plaintiffs have entered into leases for the grounds and improvements thereon, and deny that they have constructed a brick building facing on Louisiana Street at a great cost to themselves; they deny that the building cannot be used for other purposes, and deny that plaintiffs have made other large expenditures for improvements and deny that they have entered into obligations covering large sums to promote their business, and deny that they will suffer any loss if compelled to abandon said site and cease to do business there and deny that there is no other available site in said city where said business can be profitably carried on.

Defendants deny that the city has encouraged for many years last past the establishment of said livery business at said locality and vicinity, as set out in the complaint, and deny that plaintiffs relied on such encouragement and made expenditures on said buildings; they deny that plaintiffs have exercised proper care in preventing any improper deposits or smells to occur in connection with their business, and deny that they use the most improved methods for cleanliness as such methods have become known. Defendants state that plaintiffs were never given any permit to build or conduct a stable at the present location by the City Council.

Defendants deny that the City Council of the City of Lit-
19 tle Rock has the power or inclination to intimidate and discourage persons from continuing the livery business in said City, and deny that the Ordinance in question was procured to be passed by the Gus Blass Dry Goods Co., The M. M. Cohn Co., Wolf Dry Goods Co., and the Little Rock Trust Co. with others interested in the purchase of the property from plaintiffs; they deny that the passage of said Ordinance was in furtherance of the efforts of the above mentioned parties to obtain the property of plaintiffs without due process of law, or without the right of eminent domain.

Defendants deny that the buildings of plaintiffs, on account of their construction, are unsuited to other business; deny that if plaintiffs are prohibited from carrying on the livery stable business in said buildings that said property will be taken from them without proper compensation or without their day in court; defendants deny that the method of fining provided is an effort to do indirectly under the guise of the police power what the city has not the right to do directly, and denies that said Ordinance was aimed at plaintiffs directly and denies that said Ordinance is discriminative and unreasonable and not warranted by law.

Defendants deny that the plaintiffs have tried to procure another location for said business outside said district and denies that they are unable to do business elsewhere without an extravagant outlay of money.

Defendants deny that the effect of said Ordinance renders the carrying on of plaintiffs' business practically impossible; deny that said business, in drawing customers toward the locality where said

business has heretofore been carried on, largely contributed
20 and contributes now to the activity of said section as a business district, and creates custom for the business houses on Main street; deny that the enforcement of said Ordinance would deprive the plaintiffs of their property and business without compensation and due process of law.

And for further answer the defendants state: that the City Council, in passing said Ordinance, was actuated by the desire and obligation to protect the citizens of Little Rock; that said Ordinance was passed for the purpose of promoting the health and prosperity of the citizens and to increase the value of the property in said district; that it was established with the utmost good faith and with the belief that said livery stables in said district were conducive to sickness and inconvenient and ill health to the citizens and damaging to the property in that vicinity.

Defendants state that said district composes the greatest shopping district in the entire State of Arkansas; that it contains the largest and best hotels in the State, and the district encompasses the most valuable real estate in the entire State; that said stable business is conducted in a careless manner, and that it is nothing unusual in connection with said sale stables to have from fifty to one hundred head of horses and mules driven through the principal streets to said stables; that there is always an offensive ordor coming from said stables to the great detriment of the tenants in the property adjoining and to the shoppers who go within this district and hotel guests; that said stables being in such densely populated part of the city produces disease, making that section extremely un-
21 wholesome and unhealthy; that said stables retard the growth the prosperity of this district and depreciates the value of the adjoining property by at least 20% or 25%, and prevent improvements from being made thereon on account of the stables conducted in said district.

Defendants further state that the conducting of livery stables within the prescribed district is inconvenient, dangerous, offensive and unhealthy to the inhabitants of said district and to the shoppers thereof and to the community at large, for the reasons above stated, and because the livery stables afford the most favorable condition for the breeding of flies and other obnoxious insects which spread disease and contagion; that the conducting of said livery stables in said district is dangerous to the morals, health and safety of the inhabitants for the reasons above mentioned; that the fire risk is greatly increased in said district by said livery stables because of the large amount of inflam-able material that necessarily accumulates, and which is necessary for carrying on the said livery stables.

Wherefore, defendants having fully answered pray that said complaint be dismissed and for all other and proper relief that they may be entitled to.

HARRY C. HALE,
J. W. & J. W. HOUSE, JR.,
Attorneys for Defendants.

Indorsed and Filed April 22d, 1912. J. S. Maloney, Clerk.

22 In the Pulaski Chancery Court.

14432.

L. REINMAN et al., Plaintiffs,
vs.
CITY OF LITTLE ROCK et al., Defendants.

Exception and Demurrer to Answer.

Come the plaintiffs and except to the sufficiency of and demur to the answer herein and for cause state:

That the answer is insufficient in law to raise an issue of fact for this court on the justification of authority assumed by Defendant, the City of Little Rock, to pass, and the Defendants to enforce the ordinance complained of in Plaintiffs' complaint.

That said answer does not show authority to pass or enforce such an ordinance by Defendants or either of them.

That said answer renders no issue which this court will hear in response to Plaintiffs' complaint.

That said answer does not state facts sufficient to constitute a defense to Plaintiffs' complaint.

BALDY VINSON,
Attorney for Plaintiffs.

Indorsed and Filed June 12th, 1912. J. S. Maloney, Clerk, by F. A. Garrett, Deputy Clerk.

23 *Record Entries.*

14432.

L. REINMAN et al., Plaintiffs,
vs.
CITY OF LITTLE ROCK et al., Defendants.

Now on this day come the plaintiffs herein, by Watkins & Vinson and M. M. Cohn, and by leave of court file herein their complaint.

Filed February 12th, 1912.

14432.

L. REINMAN et al., Plaintiffs,
vs.
CITY OF LITTLE ROCK et al., Defendants.

Now on this day come plaintiffs herein, and by leave of court file their bond herein for the amount of $5,000.00.

Filed March 18th, 1912.

14432.

L. REINMAN et al., Plaintiffs,
vs.
CITY OF LITTLE ROCK et al., Defendants.

On this day come the defendants by Harry C. Hale and J. W. & J. W. House, Jr., their solicitors, and by leave of court file herein their answer.

Filed April 20th, 1912.

14432.

L. REINMAN et al., Plaintiffs,
vs.
CITY OF LITTLE ROCK et al. Defendants.

On this day come the plaintiffs, by their solicitor, Baldy
24 Vinson, and by leave of court file herein their demurrer to defendants' answer.

Filed June 12th, 1912.

14432.

L. REINMAN et al., Plaintiffs,
vs.
CITY OF LITTLE ROCK et al., Defendants.

Order.

This cause coming on the special and general demurrer to the answer this cause is heard on the Complaint and exhibits, the answer thereto and the said demurrer, and said demurrer is sustained, and defendants declining to plead further, it is by the court considered, ordered and decreed, that the temporary restraining order issued herein be and the same is made perpetual, and that plaintiffs have all costs herein.

To which Defendants except and pray an appeal to the Supreme Court which is by the court granted.

O. K.
J. W. HOUSE, JR.

6/12/12.
O. K.
J. E. M.

25 14432.

L. REINMAN et al., Plaintiffs,
vs.
CITY OF LITTLE ROCK et al., Defendants.

Order.

This cause coming on the special and general demurrer to the answer this cause is heard on the Complaint and exhibits, the answer thereto and the said demurrer, and said demurrer is sustained, and Defendants declining to plead further, it is by the court considered, ordered and decreed, that the temporary restraining order issued herein be, and the same is made perpetual, and that plaintiffs have all cost herein.

To which Defendants except and pray an appeal to the Supreme Court which is by this court granted.

O. K.
J. W. HOUSE, JR.

6/12/12.
O. K.
J. E. M.

26 *Cost Bill.*

14432.

L. REINMAN et al., Plaintiffs,
vs.
CITY OF LITTLE ROCK et al., Defendants.

Statement of Costs.

Sheriff's Fees	$....
Clerk's Fees	....
Witness Fees	....
Plaintiffs' Depositions	....
Defendants' Depositions	....
Cost of Transcript	$9.10
Total	....

Attest:

——— ———, *Clerk.*

27 *Certificate.*

STATE OF ARKANSAS,
County of Pulaski, ss:

I, J. S. Maloney, Clerk of Pulaski Chancery Court, do hereby certify that the annexed and foregoing pages of typewritten matter

contains a true, accurate and complete transcript of all the pleadings, papers, files and entries of proceedings in the action named in the caption; as hath appeared by comparing the same with the original thereof on file, and of record in my office.

In testimony whereof, I hereunto subscribe my name as such Clerk, and affix hereto the seal of said court, at my office in the City of Little Rock, in the County of Pulaski, this the 11th day of September, A. D. 1912.

[SEAL.]

J. S. MALONEY,
Clerk of Pulaski Chancery Court.

28 *Filing in Supreme Court.*

Pulaski Chy. *Clk.*—J. E. Martineau, J.

No. 2348.

CITY OF LITTLE ROCK et al.
v.
L. REINMAN & L. WOLFORT, Doing Business under the Firm Name of Reinman Stables; Reinman-Wolfort Automobile Livery Co., & C. L. Kraft & Co.

Transcript Filed Oct. 10, 1912.

P. D. ENGLISH, *Clerk.*

29 *Record Entries.*

STATE OF ARKANSAS,
In the Supreme Court:

Be it remembered, that at a term of the Supreme Court of the State of Arkansas, begun and held on the 25th day, being the fourth Monday of November, A. D. 1912, at the Court-house, in the City of Little Rock, the following proceedings were had, to-wit: On the 13th day of January, 1913, a day of said term:

CITY OF LITTLE ROCK et al., Appellants,
vs.
L. REINMAN et al., Appellees.

Appeal from Pulaski Chancery Court.

This cause being regularly called come the parties thereto by their solicitors and said cause is submitted upon the transcript of the record and the briefs filed and upon oral argument, and is by the Court taken under advisement.

The following proceedings were had in said cause on the 24th day of February, 1913, a day of said term (Omitting caption):

This cause came on to be heard upon the transcript of the record of the chancery court of Pulaski County, and was argued by solicitors, on consideration whereof it is the opinion of the Court that

there is error in the proceedings and decree of said Chancery Court in this cause, in this: Said court erred in granting the relief prayed for in the complaint, whereas the same is without equity and should have been dismissed.

It is therefore ordered and decreed by the Court that the decree of said chancery court in this cause rendered be, and the
30 same is hereby, for the error aforesaid, reversed, annulled and set aside with costs, and that this cause be remanded to said chancery court with directions to dismiss the complaint of the appellees for want of equity.

It is further ordered and decreed that said appellants recover of said appellees all their costs in this Court in this cause expended, and have execution thereof.

And on the 10th day of March, 1913, a day of said term, the following proceedings were had, to-wit: (Omitting caption.)

Come the appellees by solicitors and file a petition for rehearing, and pray for two weeks' time in which to prepare and file a supporting brief, which time is by the Court granted.

And on the 24th day of March, a day of said term, the following proceedings were had, to-wit: (omitting caption.)

The petition for rehearing filed herein being called, the same is submitted with the response and briefs filed, and is by the court taken under advisement.

31 *Petition for Rehearing.*

Supreme Court of Arkansas.

CITY OF LITTLE ROCK, Appellant,
vs.
REINMAN & WOLFORT et al., Appellee-.

Petition for a Rehearing and a Modification of the Judgment Herein.

The Appellees pray the Court for a rehearing and a modification of the judgment herein, and for cause state:

That by the allegations of their complaint, filed in the Pulaski Chancery Court herein, they alleged that they had for many years prior to the passage of the ordinance here in question carried on a livery and sales stable business, together with an automobile business; that said business had been established at its present place for over twenty years; that they had purchased part of the property, and leased part, so devoted to said business, and had put up a building and other improvements thereon, on which they had expended large sums of money, and that the said property was not built for any other class of business, and was not adapted to any other kind of business, and that the taking away their right to continue in said line of business at said locality would amount to a deprivation of

their property without compensation. That the City of Little Rock, the appellant, had knowledge of said facts, and that it had allowed said business to continue at said locality without objection; that there was no call for any cessation of said business at said locality,
32 the neighborhood being occupied by a class of business houses that suffered no detriment therefrom. That they kept said business and premises in as sanitary condition as was practicable, and that they were ready to adopt any other method which could be suggested to render it still more sanitary. That the dry goods and retail business was not in that neighborhood, and that the corner of Third and Scott streets in said City was not differently situated, and yet, the said business, by the terms of said ordinance, was allowed in said locality. That in addition to said ordinance the said City had adopted a permit system by which the location of said business even in the part of the said City not within the district mentioned in said ordinance would be denied, and the place where the appellee- could carry on said business was thus rendered wholly indefinite. That they could not procure another place except at a large expenditure, which they could not afford, and that the vacation of their present premises meant a large loss and inability to rent the same without a further outlay which they did not have the means to make.

That by reason of these matters the said ordinance and permit system were illegal, unconstitutional and void, as well under the Constitution of the United States as of the Constitution of the State of Arkansas.

That the appellants filed an answer to this complainant, in which some of the said allegations were denied, but that a number of the allegations were either admitted or not denied. That in said Chancery Court a demurrer was interposed to said answer which was sustained by said Court, and a decree was rendered therein granting an injunction restraining and enjoining the said appellants from enforcing or attempting to enforce said ordinance.

33 That the effect of the ruling of this Honorable Court is to deprive the appellees of the opportunity of presenting evidence to sustain those of the allegations of the Complaint as are denied by the said answer, for the said ruling orders the dismissal of the said complaint and does not remand the cause so that appellees may present evidence to sustain the allegations of their bill of complaint bearing on the question whether said ordinance and permit system does or does not amount to a deprivation of property and a denial of the equal protection of the laws; within the provisions of the Fourteenth Amendment to the Constitution of the United States, as well as the provisions of the Constitution of the State of Arkansas.

That unless the appellees are given an opportunity to introduce evidence as aforesaid the said answer may be taken as conclusive against them; that upon the finding that said demurrer was improperly sustained the cause should have been remanded to take evidence as to the said Constitutional questions, including the use and abuse of the said permit system by said City.

That the Court, in view of the matters relied upon by appellees in their bill of complaint, should have held that said ordinance and

permit system amounted to a deprivation of the property of appellees without due process of law and without compensation, and a denial of the equal protection of the laws, under the Fourteenth Amendment to the Constitution of the United States as well as under the Constitution of the State of Arkansas, as is more fully set forth in the complaint in this cause.

And the appellees pray for a rehearing herein or that the judgment of the Court be modified so as to remand the cause to
34 said Chancery Court with directions to that Court to permit the appellees to take testimony on the allegations of their complaint which are denied by the answer, and for such other relief as may not be inconsistent with the ruling of this Court.

MORRIS M. COHN,
BALDY VINSON,
Attorneys for Appellees.

We believe that the matters above set forth are well taken in point of law.

MORRIS M. COHN.
BALDY VINSON.

Indorsed and Filed March 10, 1913. P. D. English, Clerk.

35 *Rehearing Overruled.*

And on the 31st day of March, 1913, a day of said term, the following proceedings were had, to-wit: (Omitting caption).

Being fully advised, the petition for rehearing filed herein is by the Court overruled.

36 In Supreme Court of Arkansas.

FEBRUARY 24, 1913.

No. 177.

CITY OF LITTLE ROCK
v.
REINMAN et al.

Opinion.

KIRBY, *J.*:

This suit challenges the validity of the following ordinance of the City of Little Rock:

Ordinance No. 1729.

An Ordinance to Regulate Livery Stables.

"Whereas, the conducting of a livery stable business within certain parts of the City of Little Rock, Arkansas, is detrimental to the health, interest and prosperity of the City of Little Rock: there-

fore, "Be it ordained by the City Council of the City of Little Rock:

"SECTION 1. That it shall be unlawful for any person, firm or corporation to conduct or carry on a livery stable business within the following area, to-wit: Beginning at the intersection of Center Street and Markham Street, thence east on Markham Street to Main Street, thence sought on Main Street to Fifth Street, thence west on Fifth Street to Center Street, thence north on Center Street to Markham Street, the place of beginning.

"SECTION 2. Any person, firm or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and shall be fined in any sum not less than fifty ($50.00) dollars, nor more than one hundred ($100.00) dollars for
37 each violation and each day any person, firm or corporation shall conduct or carry on a livery stable business within said limits shall be deemed a separate offense.

"SECTION 3. This ordinance shall take effect and be in force sixty (60) days after its passage."

From the decree declaring it invalid, an appeal was duly prosecuted. Is this a valid ordinance?

It is contended that it is invalid, because, 1st. It prohibits the operation of a livery stable business which is not per se a public nuisance within the area defined therein in which appellee's business is and has long been conducted and deprives them of their property without due process of law.

2nd. It deprives them of the equal protection of the law and is an unjust discrimination against them.

3rd. It fixes greater penalties for its violation than the city has power to impose.

The City derives its power from the State, and Section 5454 Kirby's Digest of the statutes provides: "They shall have the power to * * * regulate or prohibit the sale of all horses or other domestic animals, at auction in the streets, alleys, or highways, to regulate all carts, wagons, drays * * * and every description of carriages which may be kept for hire and all livery stables." * * *

The State has the right under its police power to make regulations relative to the carrying on of certain lawful pursuits, trades
38 and business, and as said by the United States Supreme Court in Williams v. Arkansas, 217 U. S. 88, quoting from a former decision in Gunning v. Chicago, 177 U. S. 183, "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizens are unnecessarily, and in a manner wholly arbitrar-y interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference."

The State in the exercise of its police power has given to the City the power to regulate certain callings, pursuits, trades and business, as specified in said section of the statutes. The power to regulate gives authority to impose restrictions and restraints upon the trade or business regulated. "Regulate" means "to direct by rule or restriction, to subject to governing principles or laws." Webster's Dictionary. In City of Rochester v. West, 164 N. Y. 510, 58 N. E. 673; 53 L. R. A. 548, 79 Am. St. Rep. 659, the court said, "To regulate is to govern by, or subject to, certain rules or restrictions. It implies a power of restriction and restraint not only as to the manner of conducting a specified business, but also as to the erection in or upon which the business is to be conducted. (Cronin v. Peoples, 82 N. Y. 318).

39 Judge Dillon says: "To regulate is to govern by or subject to certain rules or restrictions. It implies a power of restriction and restraint certainly within reasonable limits as to the manner of conducting a specific business and also as to the building or erection in or upon which the business is to be conducted. By virtue of the power to regulate, it has been held that the city council may by ordinance prohibit the carrying on of a business within certain specified portions of the city. By virtue of a similar power, it has been held that it is within the authority of the common council reasonably to limit the manner by prohibiting one or more methods. * * *" 2 Dillon on Municipal Corporations, (5th Ed.) Sec. 665.

In re Wilson, 32 Minn. 148, the court said: "Under a grant of police power to regulate, the right of municipal authority to determine where and within what limits a certain class of business may be conducted has been often sustained. For example, the place where markets may be held, butcher stall or meat shops kept * * * the limits within which certain kinds of animals shall not be kept, the distance from a church within which liquor shall not be sold, etc."

In City of St. Louis v. Russell, 22 S. W. 470, the Supreme Court of Missouri, passing upon the validity of an ordinance enacted by the City of St. Louis under its charter giving it power to license, tax and regulate livery and sales stables, said:

"The first question for our consideration is whether or not the power to regulate livery and sales stables includes the right to designate the places and in what part of the city they may be located, and to prohibit their erection at other places," and further

40 after quoting from other cases, "We think that the city has the power under its charter and ordinances to regulate the place of building livery stables and confine them to certain localities within the corporate limits, as well as to regulate the manner of their keeping, as to cleanliness, that they may not be or become obnoxious and deleterious to the health of her citizens."

Although it is true as claimed by appellee that a livery stable is not per se a public nuisance and is recognized as a necessary and legitimate business, still the ordinance does not attempt to prohibit the operation of the business within the limits of the city but only

within the small area defined therein and the city having express authority to regulate all livery stables could make the restrictions notwithstanding the business regulated is not a nuisance per se.

McQuillin says: "While a livery stable in a populous community is not per se a public nuisance, it may become such and hence it has long been recognized as a subject necessarily within reasonable police regulations. Power to regulate livery stables and sales stables includes the power to limit them to certain localities and provide for their cleanliness so that they may not become injurious to health." 2 McQuillin Municipal Corporations, sec. 910.

In Ex Parte Lacy, 49 Am. St. Rep. 93, the court, construing an ordinance in which the city attempted to regulate the business of beating carpets by steam power, said: "Conceding the business covered by the provisions of this ordinance not to constitute a nuisance per se, and to stand upon different grounds from powder factories, street obstructions, and the like, still, the case is made no better for petitioner. This is not a question of nuisance per se, and the
41 power to regulate is in no way dependent upon such conditions. Indeed, as to nuisances per se, the general laws of the State are ample to deal with them. But the business here involved may properly be classed with livery stables, lau-dries, soap and glue factories, etc., a class of business undertakings, in the conduct of which police and sanitary regulations are made to greater or less degree by every city in the country. And in this class of cases it is no defense to the validity of regulation ordinances to say: "I am committing no nuisance, and I insist upon being heard before a court or jury upon that question of fact." In this class of cases a defendant has no such right. To the extent that it was material in creating a valid ordinance, we must assume that such question was decided by the municipal authorities and decided against petitioner and all others similarly situated."

The livery stable has long been a business well-nigh universally recognized and regarded as belonging to a class subject to police regulation for the protection of the public health and the promotion of the general welfare and appellees necessarily knew in engaging in such business that it was subject to reasonable regulations by the State and by the city under authority from the State.

The ordinance in question does not attempt to prohibit the carrying on of the business, but only to restrict and limit it to a certain defined territory, or rather, to prohibit the operation of it within the small prescribed area or district included in the ordinance. It does not amount to a prohibition of the business, nor was it neces-
42 sary to show that the business, as conducted amounted to a nuisance before it was subject to the provisions of this ordinance regulating it. The power to regulate is expressly given by the statute and reasonably includes, as already said, the right to limit and confine the operation of such business to certain territory and to prohibit the carrying of it on in certain other territory, which the city council, by the authority of the State was left the power to select in the exercise of a reasonable discretion. The power having been vested in the city and duly exercised by its council in the pas-

sage of the ordinance, the question is settled thereby for the necessity of the regulation. It is not unreasonable or an undue restraint upon a lawful trade or business nor an improper restraint upon the lawful and beneficial use of private property.

It is contended furtker that there are other ordinances, requiring the securing of a permit from certain city officials, before a livery stable business can be conducted in other portions of the city, outside of this restricted limit, or district, and that, such ordinances with the probable action of the city officers thereunder and this ordinance, making such restrictions, amount to a prohibition of the business in the entire city.

We have no question, however, of that kind here, and it will be time enough to determine it when it shall come before us. Neither do we think it provides an arbitrary or unjust classification of business for the purpose of regulation. The city council doubtless passed the ordinance to meet and remedy a condition actually existing and if it be conceded that it had power to regulate likewise "sales stables" and if they cannot be reasonably included within the terms "Livery Stables" as a business usually conducted with and incidental
43 thereto, still there is discretion left to the council in making the classification and we do not regard it unjustly discriminative. It operates alike upon all persons similarly situated within the territory defined and the council had the right to pass it even if it should not meet all possible conditions that might exist, as said in Ozan Lumber Co. v. Union City Bank, 207 U. S. 251, "It is almost impossible in some matters to foresee and provide for every imaginable and exceptional case and the legislature ought not to be required to do so at the risk of having its legislation declared void, although appropriate and proper upon the general subject upon which such legislation is to act, so long as there is no substantial and fair ground to say that the statute makes an unreasonable and unfounded general classification and thereby denies to any person the equal protection of the laws. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things." See also Williams v. State, 85 Ark. 464.

It is next contended that the ordinance is void because it fixes penalties for its violation beyond the power of the city to prescribe. But if this contention be well founded it does not render the ordinance invalid since under its terms, by a statute expressly authorizing it to be done the penalty would be reduced upon convictions for its violation to the amount prescribed by law in such cases. Secs. 5466-7 Kirby's Digest; Eureka Springs v. O'Neal, 56 Ark. 352.

The ordinance was a valid exercise of the city's power, under the statute authorizing it to regulate livery stables, and the decree of the lower court was erroneous.

It is reversed and the cause remanded, with directions to
44 dismiss the complaint of appellees for want of equity.

45 *Certificate.*

SUPREME COURT,
State of Arkansas:

I, P. D. English, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of The City of Little Rock, et al., Appellants, vs. L. Reinman, et al., Appellees, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this 4th day of April, 1913.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
Clerk Supreme Court of Arkansas,
By J. H. CAMPBELL, *D. C.*

Transcript fee $16.00.
Paid by Morris M. Cohn, Esq., Att'y for Plaintiffs.
P. D. ENGLISH, *Clerk.*

46 SUPREME COURT,
State of Arkansas:

LITTLE ROCK, April 3, 1913.

Hon. Morris M. Cohn, City.

MY DEAR SIR: After careful consideration of the matter, I have become convinced that there is no Federal question involved in the case of the City of Little Rock v. Reinman and have, therefore, decided to deny the writ of error to the Supreme Court of the United States. I have made endorsement to that effect upon the petition and assignment of errors and herewith return the same to you.

Yours very truly,

E. A. McCULLOCH,
Chief Justice.

47 In the Supreme Court of Arkansas.

CITY OF LITTLE ROCK, CHARLES E. TAYLOR, as Mayor of the City of Little Rock; Fred M. Cogswell, as Chief of Police of the City of Little Rock, and W. M. Tweedy, as Police Judge of the City of Little Rock, Appellants,

vs.

LOUIS REINMAN and LOUIS WOLFORT, Partners, Doing Business under the Firm Name of Reinman Stables, Reinman-Wolfort Automobile Company, and C. L. Kraft Company, Appellees.

Petition for a Writ of Error.

To the Honorable the Justices of the Supreme Court of the United States:

Now come Louis Reinman and Louis Wolfort, doing business under the firm name of Reinman Stables, Reinman-Wolfort Automobile Company, and C. L. Kraft Company, by Morris M. Cohn and Baldy Vinson, their attorneys, and complain that in the record and proceedings, and also in the rendition of a judgment in a suit between the City of Little Rock, Charles E. Taylor, as Mayor of the City of Little Rock, Fred M. Cogswell, as Chief of Police of the City of Little Rock, and W. M. Tweedy, as Police Judge of the City of Little Rock, as Appellants, and Louis Reinman and Louis Wolfort, partners, doing business under the firm name of Reinman Stables, Reinman-Wolfort Automobile Company, and C. L. Kraft Company, as Appellees, in the Supreme Court of the State of Arkansas, being the highest court of law and equity in the said State of Arkansas, in which a decision could be had in said suit, and in which a final decree was rendered against said Appellees on the 24th day of February, 1913, and a Petition for Rehearing and Modification of such Decree was denied on the 31st day of
48 March, 1913, wherein the said Appellees complain of error on the ground:

(1.) That the said final decree and denial of the prayer of said Petitioners for a Rehearing, &c., have operated to sustain an ordinance, as well as the permit system, of the City of Little Rock, State of Arkansas, notwithstanding that the same and each of them operate to deprive the Appellees, and each of them, of their property without due process of law and without compensation.

(2.) That the said final decree and denial of the prayer of said petition for a Rehearing, &c., have operated to sustain an ordinance, as well as the permit system, of the said City of Little Rock, State of Arkansas, notwithstanding the same and each of them operate to deprive the Appellees, and each of them, of the right to pursue their business without undue interference and molestation.

(3.) That the said final decree and the denial of the prayer of said petition for a rehearing, &c., have operated to sustain the said ordinance and permit system of the said City of Little Rock, and each of them, notwithstanding that the same denied to the Appellees, and each of them, the equal protection of the law.

All in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States. All of which appears in the record and proceedings of said suit, and manifest error hath happened to the damage of the said Louis Reinman and Louis Wolfort, partners doing business under the firm name of Reinman Stables, Reinman-Wolfort Automobile Company, and C. L. Kraft Company, and each of them.

Wherefore, they pray for the allowance of a writ of error and such other process as may cause the said errors to be corrected by
49 the Supreme Court of the United States.

BALDY VINSON,
MORRIS M. COHN,
Attorneys for Petitioners.

Denied April 3, 1913.
E. A. McCULLOCH,
Chief Justice of the Supreme Court of Arkansas.

Filed April 3, 1913.
P. D. ENGLISH, *Clerk.*

50 In the Supreme Court of Arkansas.

CITY OF LITTLE ROCK, CHARLES E. TAYLOR, as Mayor of the City of Little Rock; Fred M. Cogswell, Chief of Police of the City of Little Rock, and W. M. Tweedy, as Police Judge of the City of Little Rock, Appellants,

vs.

LOUIS REINMAN and LOUIS WOLFORT, Partners, Doing Business under the Firm Name of Reinman Stables, Reinman-Wolfort Automobile Company, and C. L. Kraft Company, Appellees.

Assignment of Errors.

The Appellees herein, Louis Reinman and Louis Wolfort, Partners, doing business under the firm name of Reinman Stables, Reinman-Wolfort Automobile Company, and C. L. Kraft Company, and each of them, herein assign and specify the following errors in the judgment and rulings of the Supreme Court of Arkansas herein:

First. That the said judgments and rulings are erroneous because they contravene the provisions of the Fourteenth Amendment to the Constitution of the United States in holding that the ordinance and the permit system of the City of Little Rock, State of Arkansas, and each of them, involved in this case, do not deprive said Petitioners, and each of them, of their property without due process of law and without compensation.

Second. That the said judgment and rulings are erroneous because they contravene the provisions of the Fourteenth Amendment to the Constitution of the United States, in holding that the said ordinance and permit system, and each of them, do not deprive said Petitioners and each of them of their right to carry on their business without undue interference and molestation.

51 Third. That the said judgment and rulings are erroneous because they contravene the provisions of the Fourteenth Amendment to the Constitution of the United States, in holding that the said ordinance and permit system, and each of them, do not operate unequally and discriminatively against said petitioners and each of them and against their property and business in the said City, and do not deprive them of the equal protection of the law.

Wherefore, Petitioners pray that the said errors may be corrected by the Supreme Court of the United States and that the said judgment and rulings may be reversed.

BALDY VINSON,
MORRIS M. COHN,
Attorneys for Petitioners.

Filed April 3, 1913.
P. D. ENGLISH,
Clerk Supreme Court of Arkansas.

52 Know all men by these presents, that we, Louis Reinman and Louis Wolfort, Partners, doing business under the firm name of Reinman Stables, Reinman-Wolfort Automobile Company, and C. L. Kraft Company, as Principals, and National Surety Company, of New York, N. Y., as sure*ties*, are held and firmly bound unto the City of Little Rock, Charles E. Taylor, as Mayor of the City of Little Rock, Fred M. Cogswell, as Chief of Police of the City of Little Rock, and W. M. Tweedy, as Police Judge of the City of Little Rock, in the full and just sum of Five Thousand ($5,000.00) dollars, to be paid to the said City of Little Rock, Charles E. Taylor, as Mayor of the City of Little Rock, Fred M. Cogswell, as Chief of Police of the City of Little Rock, and W. M. Tweedy, as Police Judge of the City of Little Rock, their certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this tenth day of April, in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at a day of the November Term, 1912, of the Supreme Court of the State of Arkansas, in a suit depending in said Court, betwen City of Little Rock, Charles E. Taylor, as Mayor of the City of Little Rock, Fred M. Cogswell, as Chief of Police of the City of Little Rock, and W. M. Tweedy, as Police Judge of the City of Little Rock, as Appellants, and Louis Reinman and Louis Wolfort, Partners, doing business under the firm name of Reinman Stables, Reinman-Wolfort Automobile Company, and C. L. Kraft Company, as Appellees, a judgment was rendered against the said Louis Reinman and Louis Wolfort, Partners, doing business under the firm name of Reinman Stables, Reinman-Wolfort Automobile Company, and C. L. Kraft Company, and the said Louis Reinman and Louis Wolfort, Partners, doing business under the firm name of Reinman Stables, Reinman-Wolfort Automobile Company,
53 and C. L. Kraft Company, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court

to reverse the judgment in the aforesaid suit, and a citation directed to the said City of Little Rock, Charles E. Taylor, as Mayor of the City of Little Rock, Fred M. Cogswell, as Chief of Police of the City of Little Rock, and W. M. Tweedy, as Police Judge of the City of Little Rock, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Louis Reinman and Louis Wolfort, Partners, doing business under the firm name of Reinman Stables, Reinman-Wolfort Automobile Company, and C. L. Kraft Company shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

LOUIS REINMAN AND
LOUIS WOLFORT, [SEAL.]
Partners, Doing Business under the Firm Name of Reinman Stables,
By MORRIS M. COHN, *Att'y.*
REINMAN-WOLFORT AUTOMOBILE COMPANY, [SEAL.]
By MORRIS M. COHN, *Att'y.*
C. L. KRAFT COMPANY, [SEAL.]
By MORRIS M. COHN, *Att'y.*
NATIONAL SURETY COMPANY, [SEAL.]
By W. H. RONSAVILLE,
Attorney-in-Fact.

Sealed and delivered in presence of
CHAS. T. CHAPMAN.

Approved by
WILLIS VAN DEVANTER,
Associate Justice of the Supreme Court of the United States.

Filed April 18th, 1913.
P. D. ENGLISH, *Clerk.*

54 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The City of Little Rock, Charles E. Taylor, as Mayor of the City of Little Rock, Fred M. Cogswell, as Chief of Police of the

City of Little Rock, and W. M. Tweedy, as Police Judge of the City of Little Rock, appellants, and Louis Reinman and Louis Wolfort, partners doing business under the firm-name of Reinman Stables, Reinman-Wolfort Automobile Company, and C. L. Kraft Company, appellees, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution,
55 or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said appellees, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 10th day of April, in the year of our Lord one thousand nine hundred and thirteen.

JAMES H. McKENNEY,
Clerk of the Supreme Court
of the United States.

Allowed by
WILLIS VAN DEVANTER,
Associate Justice of the Supreme
Court of the United States.

Filed April 18, 1913.
P. D. ENGLISH, *Clerk.*

56 UNITED STATES OF AMERICA, *ss:*

To The City of Little Rock, Charles E. Taylor, as Mayor of the City of Little Rock; Fred M. Cogswell, as Chief of Police of the City of Little Rock, and W. M. Tweedy, as Police Judge of the City of Little Rock, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Arkansas, wherein Louis Reinman and Louis Wolfort, partners doing business under the firm-name of Reinman Stables, Reinman-Wolfort Automobile Company, and C. L. Kraft Company, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Willis Van Devanter, Associate Justice of the Supreme Court of the United States, this 10th day of April, in the year of our Lord one thousand nine hundred and thirteen.

WILLIS VAN DEVANTER,
Associate Justice of the Supreme Court of the United States.

Filed April 18, 1913.
P. D. ENGLISH, *Clerk.*

57 We hereby acknowledge service of this citation this the 14 day of April, 1913.

J. W. & J. W. HOUSE, JR.,
Attorneys for Defendants in Error.

I hereby acknowledge service of this citation this the 17 day of April, 1913.

HARRY C. HALE,
City Attorney of Little Rock and Attorney for Defendants in Error.

58 STATE OF ARKANSAS,
In the Supreme Court:

I, Peyton D. English, Clerk of the Supreme Court of the State of Arkansas, do hereby certify that the above and foregoing eleven pages from "A to L" inclusive, contain a true and perfect copy of the Petition for Writ of Error, Assignment of Errors, and Supersedeas Bond, of the Plaintiffs in Error in the case therein mentioned, filed in my office and, also the original Writ of Error and Citation filed with me as such clerk.

In witness whereof I have hereunto set my hand and affixed the

seal of said court at my office in the City of Little Rock, this the 18th day of April, 1913.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas.

Additional Transcript $2.50 paid by Plaintiffs in error.
Attest:

P. D. ENGLISH, *Clerk.*

Endorsed on cover: File No. 23,649. Arkansas Supreme Court. Term No. 153. Louis Reinman and Louis Wolfort, partners doing business under the firm name of Reinman Stables, Reinman-Wolfort Automobile Company, and C. L. Kraft Company, plaintiffs in error, vs. The City of Little Rock et al. Filed April 22d, 1913. File No. 23,649.

2

NUMBER 153.

IN THE

Supreme Court of the United States.

LOUIS REINMAN AND LOUIS WOLFORT, PARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF REINMAN STABLES, REINMAN-WOLFORT AUTOMOBILE COMPANY, AND C. L. KRAFT COMPANY, PLAINTIFFS IN ERROR,

VS.

THE CITY OF LITTLE ROCK ET AL.

ABSTRACT, BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

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ABSTRACT.

This is a controversy involving the question as to the constitutionality of an ordinance of the City of Little Rock, in the State of Arkansas, under the Fourteenth Amendment to the Constitution of the United States.

The plaintiffs in error instituted their bill of complaint, in the Pulaski Chancery Court of that State—a court having general chancery jurisdiction—for an injunction against the said city, and its proper officers, to enjoin them from enforcing, by penalties therein denounced, an ordinance, in words and figures as follows, to-wit:

Ordinance No. 1729.

An Ordinance to Regulate Livery Stables.

Whereas, the conducting of a livery stable business within certain parts of the City of Little Rock, Arkansas, is detrimental to the health, interest and prosperity of the City of Little Rock; therefore,

Be It Ordained by the City Council of the City of Little Rock:

Section 1. That it shall be unlawful for any person, firm or corporation to conduct or carry on a livery stable business within the following area, to-wit: Beginning at the intersection of Center Street and Markham Street; thence east on Markham Street to Main Street; thence south on Main Street to Fifth Street; thence west on Fifth Street to Center Street; thence north on Center Street to Markham Street, the place of beginning.

Section 2. Any person, firm or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and shall be fined in any sum not less than fifty ($50.00) dollars, nor more than one hundred ($100.00) dollars for each violation, and each day any person, firm or corporation shall conduct or carry on a livery stable business within said limits shall be deemed a separate offense.

Section 3. This ordinance shall take effect and be in force sixty (60) days after its passage.

Passed October 23, 1911.

Approved: Chas. E. Taylor, Mayor.

Attest: Geo. A. Counts, City Clerk.

(Printed Record, 6.)

They averred that L. Reinman and L. Wolfort, under the firm name of Reinman Stables maintained on the east side of Louisiana Street, between Third and Fourth Streets, in said City, a livery and sales stable business, conducted in a brick building, and that they had maintained and operated the business so mentioned at that locality for a period exceeding ten years last past, and that said locality and premises had been so used for a period exceeding over twenty-five years preceding the time they had begun to conduct that business at said place. That for a long time they had used the adjoining corner lots (at Louisiana and Third Streets) for similar purposes, but when automobiles came into general use they, together with other parties, installed at said corner lots an automobile business, about four years ago, which was conducted by a company called the Reinman-Wolfort Automobile Livery Company, which carried on said business at the corner; but, for the sake of economy and the proper facilitation of business, and to avoid loss in management, the said livery and sales stable business and said automobile business in a measure utilized one another's quarters.

That C. L. Kraft & Company was a corporation, located on Third Street, between Center and Louisiana Streets, in a brick building, where it was doing a general livery business, carefully and properly, in accordance with the rules and regulations of the Board of Health of the State of Arkansas; and that for a number of years past said livery business had been conducted at said point,

without any complaint as to sanitary conditions or the manner in which the same was kept.

That the livery and sales stable business of Reinman Stables had always been located in the business section of the City of Little Rock, but not within its principal business or shopping district, and that the locality where it was located, where the lots were not vacant, was occupied, for the most part, with small places of business devoted to negro traffic; that very little business was transacted upon Third Street, at that locality, or anywhere in the neighborhood, except on Main and Third Street, which is a shopping district. That like Scott and Street, which is a shopping district. That it was off of the main business thoroughfare.

That plaintiffs in error, during the progress of their said livery and sales stable business had been compelled to enter into leases for the grounds and improvements and for the purposes of their business had constructed a three-story brick building upon the lots facing Louisiana Street, at great cost to themselves, and that the said building could be used for no other purpose; that they used said building and premises in their said business, and had made large expenditures for this purpose, and had entered into obligations covering large sums in this connection; which would be lost to them in large part, if not wholly, if they were compelled to abandon said site and cease to do business there. That there was no available site in said city where the said business could be profitably carried on, where the plaintiffs could have assurance that they might remain with-

out molestation; that they did not know where to move, if a move was practicable, for there was pending before the council of said city another ordinance levied against plaintiffs, embracing a larger district.

That they had tried to obtain another location outside said district, for their said business, but had been unable to do so except at an extravagant outlay, which they were unable to make; that they would have done this, not because the action of said city was legal and proper, but because they did not want to be harassed and vexed by litigation and prosecutions in the police court of said city; that the said Ordinance and the permit system adopted by said city left it uncertain where the said business might be carried on, and was unwarranted by law; that under them the Mayor and Chief of police of said city would compel plaintiffs in error to show a license at all times for doing said business at any place where they might locate; that said ordinance and permit system relegated the said business to a section of said city which was outside of the business district where said business could be profitably carried on; and that said part of said city was in or in close proximity to the residential part of said city; that as a rule livery stables are objected to by persons in the residential part of the city, and are not located there, but are located in some part of the business district; that the effect of said Ordinance, and permit system, was to render the carrying on of said business practically impossible. That plaintiffs endeavored to keep said premises in a proper sanitary condition, and stood ready to adopt any additional meas-

ures for this purpose which the court might direct. And they averred that the said business, in drawing customers towards the locality where the said business had theretofore been carried on, had largely contributed and contributed then to the activity of the said section as a business district, and created customers for the business houses on Main Street.

That the matters above recited were matters of public notoriety, and were, or could have been known to said city, and that it encouraged for many years past the establishment of said character of business at the said locality and the vicinity, and on such encouragement the said buildings and expenditures were made by plaintiffs; that no material change in the situation, as it had been all along for years and the present time, had occurred, except that the care exercised by plaintiffs had been constantly greater to prevent improper smells or deposits; they had used the most approved methods for cleanliness as such methods had become known.

That there was no occasion for said Ordinance, but the passage thereof was procured by parties, some of whom were named, with a view to impairing the value of said property, for the purpose of buying it; that some of said parties had tried to buy the property of some of the plaintiffs in error (naming them), but had failed; and that they had followed this with suit for alleged nuisance against said plaintiffs in error, which was dismissed, and, finally, by procuring the passage of said Ordinance.

The complaint sets forth the terms of the Ordinance, and it states that thereby a penalty of not less than fifty

dollars and not more than one hundred dollars for each day's violation of the ordinance is thereby denounced—each day's continuance of said livery business being a separate offense. That, in addition, the council of said city, by resolution has reserved the option not to issue a permit for the erection of any building, for livery purposes, beyond the district mentioned in the Ordinance; the effect being that the City Council reserves the option, in every case, of saying whether any person shall, within any fixed limits, do such a business in said city.

That plaintiffs' buildings on which they have expended large sums of money, are unsuited by their construction to other business, and that to remove them is in effect to take their property without just compensation, and in violation of Section 1, Article XIV of the Constitution of the United States.

That the defendants, unless restrained and enjoined from so doing, will endeavor to enforce said Ordinance and permit system, and will endeavor, by the accumulation of large penalties, and by other vexatious means, to constrain plaintiffs to close their said business and destroy the value of the same, and by this method take away their property and business without compensation or due process of law, oppressively, arbitrarily and in contravention of law. That the said action of said city is in contravention to the provisions of the Fourteenth Amendment to the Constitution of the United States, prohibiting any state or any city within the same, from passing any law and enforcing the same, where it is unequal, unreasonable or discriminative, or where it de-

prives a person of his property rights without compensation or due process of law.

The prayer to the bill of complaint asked that the defendants and each of them be jointly and severally restrained from enforcing or attempting to enforce said Ordinance, or to carry out said permit system, either in person or by representatives or other officers, against plaintiffs in error, or their said business, and that they be restrained from endeavoring to vex and harass them with proceedings for penalties under said Ordinance, and, that on final hearing, the said order be made a perpetual injunction; and they prayed for costs and other proper relief (Printed Record, 1-5).

It should be stated that a demurrer to the bill of complaint was first filed which was overruled by the trial court; that then an answer was filed to the bill in the same court (Printed Record, 8-10), which was demurred to; that this demurrer was sustained, and a decree was rendered by that court, in accordance with the prayer of the bill of complaint (*Id.* 11-13).

The defendants prayed an appeal from the decree of the Chancery Court, to the Supreme Court of Arkansas (*Id.* 13-15). And that court rendered the following judgment:

"This cause came on to be heard upon the transcript of the record of the Chancery Court of Pulaski County, and was argued by solicitors, on consideration whereof it is the opinion of the court that there is error in the proceedings and decree of said Chancery Court in this

cause, in this: said court erred in granting the relief prayed for in the complaint, whereas the same is without equity and should have been dismissed.

"It is therefore ordered and decreed by the court that the decree of said Chancery Court in this cause rendered be, and the same is hereby, for the error aforesaid, reversed, annulled and set aside with costs, and that this cause be remanded to said Chancery Court with directions to dismiss the complaint of the appellees for want of equity.

"It is further ordered and decreed that the said appellants recover of said appellees all their costs in the court in this cause expended and have execution thereof" (*Id.* 14, 15).

So that it appears that the questions involved herein arise upon the bill of complaint, filed in the said Pulaski Chancery Court; for by the final judgment and decree of the Supreme Court of Arkansas, it has been dismissed for want of equity.

Assignments of error and petition for writ of error and supersedeas bond were duly filed (*Id.* 23, 24). And a writ of error has been duly allowed (*Id.* 26). And citation has been duly served. (*Id.* 28). We have stated the assignments of error under the next succeeding head.

In the opinion of the Supreme Court of Arkansas, which is copied into the record, it appears that the questions discussed, among other matters, deal with the point as to whether the Fourteenth Amendment to the Constitution of the United States had been contravened herein (Printed Record, 17).

ASSIGNMENT OF ERRORS.

First. That the said judgments and rulings of the Supreme Court of Arkansas are erroneous because they contravene the provisions of the Fourteenth Amendment to the Constitution of the United States in holding that the ordinance and permit system of the City of Little Rock, State of Arkansas, and each of them, involved in this case, do not deprive said petitioners, and each of them, of their property without due process of law and without compensation.

Second. That the said judgment and rulings of the Supreme Court of Arkansas are erroneous because they contravene the provisions of the Fourteenth Amendment to the Constitution of the United States, in holding that the said ordinance and permit system, and each of them, do not deprive said petitioners and each of them of their right to carry on their business without undue interference and molestation.

Third. That the said judgment and rulings of the Supreme Court of Arkansas are erroneous because they contravene the provisions of the Fourteenth Amendment to the Constitution of the United States, in holding that the said ordinance and permit system, and each of them do not operate unequally and discriminatively against the said petitioners and each of them against their property and business in the said city, and do not deprive them of the equal protection of the law.

BRIEF.

1. Here there was no nuisance *per se*. The livery stables were conducted in a sanitary and proper manner, and had been so for ten or more years. If any improvement was necessary in order to preserve the sanitary character of the premises plaintiffs in error agreed to install same. Any such necessary improvement should have been pointed out as was done in *Durfey* v. *Thalheimer*, 85 Ark. 544, 555, (p. 19, *infra*).

2. The recital of facts shows that here the motive is to harass plaintiffs in error, and force them to close up their business and sell out their property at a great sacrifice to influential interests that are named (p. 20, *infra*).

3. Plaintiffs in error have endeavored to obtain a new location, without prohibitive outlay, but have failed to do so (p. 19, *infra*).

4. An ordinance does not stand upon the same plane as an act of the legislature, when the question arises as to whether fraud or corrupt motive entered into its enactment. *Dobbins* v. *Los Angeles*, 195 U. S. 223, 240; *State ex rel.* v. *Gates*, 190 Mo. 540, 555, 556, 89 S. W. 881, 2 L. R. A. (N. S.) 152; *Barber Asphalt Pav. Co.* v. *French*, 158 Mo. 534, 547, 58 S. W. 934; *Knapp* v. *St. Louis*, 156 Mo. 343, 353, 56 S. W. 1102; *Kansas City* v. *Hyde*, 196 Mo. 498, 506, 96 S. W. 201; *Glasgow*

v. *St. Louis*, 107 Mo. 198, 203, 17 S. W. 743; *People ex rel. Negus* v. *Dwyer*, 90 N. Y. 402 (p. 20, *infra*).

5. *Norwood* v. *Baker*, 172 U. S. 269, is a ruling to the effect that fraudulent imposition on the part of the Village of Norwood, against Baker, was not permissible. That was the peculiarity of that holding. *Cp. French* v. *Barber Asphalt Pav. Co.*, 181 U. S. 324, 344 (p. 21, *infra*).

6. There are many rulings in Arkansas holding that livery stables are not nuisances *per se*. *Durfey* v. *Talheimer*, 85 Ark. 544; *Helena* v. *Dwyer*, 64 Ark. 424; *Terrell* v. *Wright*, 87 Ark. 213; *Swain* v. *Morris*, 93 Arkansas, 362; *Cooper* v. *Whissen*, 95 Arkansas, 545 (p. 22, *infra*).

7. The bill of complaint sets forth facts showing that the livery stables mentioned are as clean and as harmless as grocery stores, or drug stores, or cafes, or barber shops (p. 22, *infra*).

8. A nuisance *per se* is a "nuisance at all times and under any circumstances regardless of location or surroundings." *Swain* v. *Morris*, 93 Arkansas, p. 368; *Cooper* v. *Whissen*, 95 Arkansas, p. 548 (p. 22, *infra*).

9. Anybody has a right to suppress a nuisance *per se*. *Harvey* v. *Dewoody*, 18 Arkansas, 252; *Wright* v. *Morris*, 43 Arkansas, 193 (p. 22, *infra*).

10. But this could not be true of the stables here in controversy. The city had seen them located, and encouraged their development and improvement, and the

buildings constructed for their purposes, for ten years and over. And it thereby estopped itself from compelling their removal. *Lonoke* v. *Chicago, Rock Island & Pacific Ry. Co.*, 92 Arkansas, 546, 552, citing *Harvey* v. *Aurora & G. R. Co.*, 186 Ill. 283; *Los Angeles* v. *Los Angeles City Water Co.*, 177 U. S. 558; McQuillan, Municipal Corporation, III, Secs. 1318-1320 (p. 23, *infra*).

11. To defeat this application of the doctrine of estoppel just mentioned it would have to appear that the business was a nuisance *per se*. *Lonoke* v. *Chicago, R. I. & Pac. Ry. Co., supra* (p. 23, *infra*).

12. *Fertilizer Company* v. *Hyde Park*, 99 U. S. 659, is not to the contrary. There the nuisance was of a flagrant character. There was a nuisance *per se* (p. 23, *infra*).

13. The locality where the business of plaintiffs in error is located, where the lots are not vacant, is occupied by small shops devoted to negro traffic. It has not been otherwise for many years. The lots occupied by plaintiffs in error have for 35 years past been so occupied. The present effort to remove is by designing men, who seek to buy the property at a reduced value, and not because the locality is no longer fit for such business. It is in a business neighborhood, but the business is of the character mentioned, and that has always been the case. And the plaintiffs on the faith thereof have expended large sums of money; and they have been encouraged so to do all along by the city (p. 24, *infra*).

This case is not distinct in principle from *Dobbins* v. *Los Angeles*, 195 U. S. 223, 236, 240, citing *Lawton* v. *Steele*, 152 U. S. 133, 137. See also *Yates* v. *Milwaukee*, 10 Wall, 497; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *City of Denver* v. *Rogers*, 46 Colo. 479; *New Orleans* v. *Lagasse*, 114 La. 1055; *St. Louis* v. *Dreisoerner*, 147 S. W. (Mo.) 998; *San Antonio* v. *Salvation Army*, 127 S. W. (Tex.) 860; *Everett* v. *Council Bluffs*, 46 Iowa, 66; *Railroad Company* v. *Joliet*, 79 Ill. 26, 39; *In re Quo Wong*, 13 Fed. 229; *The Stockton Laundry case*, 26 Fed. 611; *In re Sam Kee*, 31 Fed. 680; *In re Hong Wah*, 82 Fed. 623 (p. 24, *infra*).

14. A business does not become a nuisance by the fiat of a city council, without trial or a hearing, and a business cannot be suppressed or be broken up or be compelled to abandon its old and long established site, without compensation, upon any other theory than that it has become a nuisance *per se*. *City of Denver* v. *Rogers*, 46 Colo. 479; *St. Louis* v. *Dreisoerner*, 147 S. W. (Mo.) 998; *Yates* v. *Milwaukee*, 10 Wall, 497, 505 (p. 27, *infra*).

15. A city council cannot legislate so as to discriminate against a business man or property owner, if the effect is to destroy or impair the value of his property. *New Orleans* v. *Lagasse*, 114 La. 1055; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Chy Lung* v. *Freeman*, 92 U. S. 275; *Dobbins* v. *Los Angeles*, 195 U. S. 223; *Eubank* v. *Richmond*, 226 U. S. 137, 143, 144 (p. 28, *infra*).

16. Although a law be fair on its face and impartial in its appearance, yet, if it is applied and administered with an evil eye and illegal discrimination, it is within the protection of the Federal Constitution. *Chy Lung* v. *Freeman*, 92 U. S. 275 (p. 28, *infra*).

17. There is a decided difference between prohibiting livery and sales stables to be located in the future residence localities, and seeking to close up livery stables which have existed and been built up in business localities; especially where the business localities had not changed. Of the first named class were *Russell* v. *St. Louis*, 22 S. W. 470, mentioned by the Supreme Court of Arkansas, and *Fisher* v. *St. Louis*, 194 U. S. 361. (See *Phillips* v. *City of Denver*, 19 Colo. 179; *Crowley* v. *West*, 27 So. 53, 47 L. R. A. 652, 656; *Everett* v. *Council Bluffs*, 46 Iowa, 66; *Los Angeles* v. *Hollywood Cemetery*, 124 Cal. 344; *In re Whitwell*, 98 Cal. 73; *Grossman* v. *Oakland*, 30 Ore. 478.) (p. 29, *infra*).

18. This is not like the cases where lotteries, saloons or pool rooms have been prohibited; for in such cases the Council is free to do as it pleases, since the occupations are of no practical use to society. Such was the case of *Murphy* v. *California*, 225 U. S. 623 (p. 29, *infra*).

19. The making the relocation of the stables depend upon a permit system, of uncertain character, subject to the caprice or malice of city officials, or those who have influence over them, is in conflict with the provisions of the Fourteenth Amendment. Compare

Eubanks v. *Richmond*, 226 U. S. 137, 143; *Richmond* v. *Dudley*, 129 Ind. 112; *State* v. *Mahner*, 43 La. Am. 496; *Newton* v. *Belger*, 143 Mass. 598; *Steele* v. *Tenant*, 110 N. C. 609; *St. Louis* v. *Russell*, 22 S. W. 470 (p. 30, *infra*).

20. The cases of *Gundling* v. *Chicago*, 177 U. S. 183, and *Williams* v. *Arkansas*, 217 U. S. 79, relied upon by the Supreme Court of Arkansas in this case, are not in conflict with the above citations and doctrines (p. 30, *infra*).

ARGUMENT.

The question here is whether or not, on the face of the bill of complaint, filed by the plaintiffs in error, against the City of Little Rock, and its officers, such a case has been made out as entitles them to relief here, under the Fourteenth Amendment to the Constitution of the United States.

It appears therefrom that, for many years prior to October 23, 1911, the plaintiffs in error were established in the livery and sales stable business, on Louisiana Street and on Third Street, in the City of Little Rock, State of Arkansas; that these places of business were developed in the course of many years, were carefully kept, in the most sanitary manner, according to the most approved methods, and the rules and regulations of the Board of Health of the State of Arkansas; that in the course of this development large improvements had been made, including the construction of a three-story brick building, adapted to that kind of business, and long leases had been entered into, and heavy obligations contracted, involving a large expenditure of money. That at the time these matters occurred, and up to the date of the filing of the bill of complaint, both Louisiana and Third Streets, at this locality and the vicinity, were occupied by small shops devoted to negro traffic, where the lots were not vacant, and that besides this there was no business of any kind until one arrived at the corner of Main and

Third Streets, which was not in the vicinity. That the City of Little Rock was aware of these matters, they being of such notoriety that it could not fail to be aware of them. That the locality aforesaid had for twenty-five years before plaintiffs in error went into the business been devoted to that business, and no other, and that no change in the actual situation of affairs there had ever occurred, up to the date of the filing of the bill of complaint.

That shortly before the filing of the bill of complaint certain parties who wished to purchase the property so occupied had tried to buy the same, or part of it, from some of the plaintiffs in error, but had not succeeded, that then they proceeded to harass them with a suit upon the ground that they (plaintiffs in error) maintained a nuisance at said locality, which was dismissed, and that then as a means of compelling a sale of the property so occupied, at a reduced value, by plaintiffs in error, or some of them, they procured the passage of the ordinance in question.

That this ordinance was aimed to force plaintiffs in error to abandon their present site, lose the value of their improvements and carry out obligations connected therewith, at a complete loss, and remove elsewhere in said city; the alternative being some district fixed, it is true, by the ordinance complained of, but left uncertain by the employment of a permit system introduced by defendants, and a new and more extended ordinance then projected to harass plaintiffs in error, and practically put them out of their said business.

The fact is mentioned in the bill of complaint that, ordinarily, livery stables are not compelled to locate in or near residence districts, but that by the terms of this ordinance the only place left for such business, in the said city, is a locality in or near the residence districts.

Plaintiffs in error likewise appear to have endeavored to obtain a location available to them, without prohibitive outlay, but have been unable to do so.

There can be no doubt as to the good faith of the plaintiffs in error. Not only do they appear to have conducted the said business with care, according to the most approved methods, but they obligated themselves to the court to carry out any improvement or change that the court might suggest, looking to the proper conduct of the business.

On one occasion at least that course was approved by the Supreme Court of the State of Arkansas. In the case of *Durfey* v. *Thalheimer*, 85 Arkansas, 544, 555, where a complaint had been filed against livery stable owners, on the ground that it was a nuisance, that court held that it was not a nuisance, and said:

> "But we think that the southern wall of the stable of defendant, which is next to plaintiff's residence, should have been made solid, and no openings should have been left therein for windows or doors, and for the better protection of plaintiff, such openings as were left therein should be closed and filled with material which will make the wall solid; and that defendants should be required to do so without unnecessary delay."

In other words, the facts recited in the bill of complaint reveal an arbitrary use of power by a city, at the instance of designing men, to coerce, and compel a removal of a business from a locality where it has always been carried on, in the business section of the city, and its consequent destruction; whereby the value of their lot of ground will be lessened, and they may be induced to part therewith. There can be no question that the recital of facts therein contained sets forth such a state of case, and it does not gainsay this to contend that the motive of a city, or a council of a city, in passing an ordinance, will not be inquired into. That point cannot arise until the question of proof is up for determination. Besides, the weight of authority now appears to favor the contention that an ordinance of a city council does not, in this respect, stand upon the same plane as an act of the Legislature of a State; that an ordinance may be assailed for fraud or corrupt influence (*Dobbins* v. *Los Angeles*, 195 U. S. 223, 240, quoted later on); *State ex rel.* v. *Gates*, 190 Missouri, 540, 555, 556, 89 S. W. 881, 2 L. R. A. (N. S.) 152; *Barber Asphalt Pav. Company* v. *French*, 158 Missouri, 534, 547, 58 S. W. 934; *Knapp* v. *St. Louis*, 156 Missouri, 343, 353, 56 S. W. 1102; *Kansas City* v. *Hyde*, 196 Missouri, 498, 506, 96 S. W. 201; *Glasgow* v. *St. Louis*, 107 Missouri, 198, 203, 17 S. W. 743; *People ex rel. Negus* v. *Dwyer*, 90 N. Y. 402.

It was said in *State ex rel.* v. *Gates*, 190 Missouri, 540, 555, 556 (2 L. R. A. (N. S.) 152, 157):

> "Nor does an act of a common council, after its passage, even though it be strictly legislative in its character, stand on exactly the same plane as an act of the general assembly, for that, whereas the validity of an act of the general assembly cannot be impeached in a court on the ground that its passage was obtained by fraud or corrupt influence, yet an ordinance may be so assailed."

In *Barber Asphalt Pav. Company* v. *French*, 158 Missouri, 534, 547 (54 L. R. A. 492, 498), it was said:

> "It is true that in many jurisdictions—certainly in this state—it is true that municipal acts, whether in the form of ordinances or resolutions, may be impeached for fraud at the instance of persons injured thereby (1 Dillon, Mun. Corp. 4 Ed. Sec. 311; *Glasgow* v. *St. Louis*, 107 Missouri, 203); whereas courts will not inquire into the motives of the legislature."

The decision in the case of *Norwood* v. *Baker*, 172 U. S. 269, was swayed by the fraudulent imposition therein sought to be imposed upon the land of Ellen R. Baker by the Village of Norwood. The case is singular by reason of this fact. (*French* v. *Barber Asphalt Pav. Company*, 181 U. S. 324, 344.) It goes far to sustain the position above referred to.

But whether this be so or not, enough appears in the bill of complaint to show that an established and legitimate business of plaintiffs in error is, arbitrarily and unjustly sought, through cumulative penalties, by the City of Little Rock, and those acting for it, to be destroyed, and the value of their property impaired.

The livery stable business of plaintiffs in error is a legitimate one. That fact has been settled by the decisions in Arkansas. (*Durfey* v. *Thalheimer*, 85 Arkansas, 544; *Helena* v. *Dwyer*, 64 Arkansas, 424; *Terrell* v. *Wright*, 87 Arkansas, 213; *Swain* v. *Morris*, 93 Arkansas, 362, 367; *Cooper* v. *Whissen*, 95 Arkansas, 545.) The bill of complaint, which was dismissed, on its face disclosed that the business of plaintiffs in error was, and always had been, properly conducted, and that they were ready to adopt any innovations or improvements which the court might order. So that the business was as legitimate as the grocery business, or the drug business, or a barber shop, or a cafe—all of which send forth odors.

A nuisance *per se* is a "nuisance at all times and under any circumstances, regardless of locations or surroundings." (*Swain* v. *Morris*, 93 Arkansas, p. 368; *Cooper* v. *Whissen*, 95 Arkansas, p. 548.) Therefore, a livery stable business, in order to be a nuisance *per se*, must be such manner of business and so conducted, that it would be inherently so offensive that it would not be permitted anywhere, as of right. Anybody has the right to suppress a nuisance *per se*. (*Harvey* v. *Dewoody*, 18 Arkansas, 252; *Wright* v. *Morris*, 43 Arkansas, 193.) But nobody had a right to suppress the business of the plaintiffs in error—particularly as they were inoffensive and sanitary in every detail.

This ordinance then is effective to destroy the legitimate business and property occupied thereby of the plaintiffs in error. The effect of it is to arbitrarily stop the business, compel a cessation thereof, in the business

section of the city—the proper place for it; and this although, for ten years and more, during which the same conditions applied as at the time the bill of complaint was filed, the city allowed and encouraged it at the same locality, so that large sums of money were invested, heavy obligations incurred, and buildings were erected that have little value for other purposes. In a case similar in principle, the Supreme Court of the State of Arkansas, invoked and applied the doctrine of estoppel against a town in that state. (*Lonoke* v. *Chicago, Rock Island & Pacific Ry. Co.*, 92 Arkansas, 546, 552; citing *Harvey* v. *Aurora & G. R. R. Co.*, 186 Illinois, 283.) And see *Los Angeles* v. *Los Angeles City Water Company*, 177 U. S. 558; McQuillan Municipal Corporations III, Secs. 1318-1320.) If it be said, that estoppel will not justify a nuisance or protect it, we reply that here the business was no nuisance *per se* or otherwise. (*Cp. Lonoke* v. *Chicago, Rock Island & Pacific*, 92 Arkansas, p. 552.) To defeat the estoppel it would have to be a nuisance *per se* (*Id.*). To defeat the application of the doctrine of estoppel it would have to appear that the occupation or business was *per se* a nuisance; such as a public nuisance. The decision in the case of *Fertilizer Company* v. *Hyde Park*, 97 U. S. 659, it is submitted, is not to the contrary. There the court said:

> "That a nuisance of a flagrant character existed, as found by the court below, is not controverted" (97 U. S. p. 667).

That was a case where the business was *per se* a nuisance or offensive. That is to say it was bound to

become offensive and a nuisance by the residence of many people in its vicinity. "In such cases?" said the court in *Fertilizer Company* v. *Hyde Park*, "prescription, whatever the length of time, has no application" (Id. pp. 668, 669).

It is plain to be seen, from the allegations of the complaint, that while the neighborhood on Third and Louisiana Streets, in Little Rock, is and for years past has been a business neighborhood, the business it has attracted consists of small shops, devoted to negro traffic, if the lots are not vacant. And it is equally manifest that the business on the main business thoroughfare is only affected thereby to its advantage. All of which goes to show that the impulse to pass the Ordinance was just from such a source as the complaint sets forth.

This is not all that can be said. Not only is the present location declared to be inhibited, but the plaintiffs in error are required to defer to the uncertain whim of the council and officers of the City of Little Rock, in seeking and obtaining a place for future location. They allege that no practicable location is open to them.

There is no distinction in principle between the present case and that of *Dobbins* v. *Los Angeles*, 195 U. S. 223. In that case an Ordinance of the City of Los Angeles was passed, and a permit was granted under it to a gas and fuel company for the erection of a plant, and the erection of the same was proceeded with. Later another ordinance was passed by that city excluding the said business from that locality. There had been no change in the actual conditions in that neighborhood.

And this was held to amount to an arbitrary and discriminatory exercise of the police power, and to a taking of property without due process and an impairment of property rights protected by the Fourteenth Amendment.

There it was held that the exercise of the police power by the States, and their municipalities, was not unlimited, even as to occupations whose pursuit involve the spread of noxious odors or other objectionable incidents. (195 U. S. 236.) It was said, quoting from the language of Mr. Justice Brown, in *Lawton* v. *Steele*, 152 U. S. 133, 137, that:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislation may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations."

And other cases decided by this court, to the same effect, were therein quoted from and followed. And it was therein decided that such a case of estoppel had occurred, by reason of the encouragement given to the gas and fuel company, under the first ordinance and permit, as to preclude the passing of the second ordinance; that the power to inhibit noxious occupations, in localities in cities, would not justify the prohibition of such an oc-

cupation, where the conditions calling for the exercise of the power had been and remained unchanged.

In that case it was also said:

> "It is urged that, where the exercise of legislative municipal power is clearly within constitutional limits, the courts will not inquire into the motives which may have actuated the legislative body in passing the ordinance or law in question. Whether, when it appears that the facts would authorize the exercise of the power, the courts will restrain its exercise because of alleged wrongful motives inducing the passage of an ordinance is not a question necessary to be determined in this case, but where the facts as to the situation and conditions are such as to establish the exercise of the police power in such manner as to oppress or discriminate against a class or an individual the courts may consider and give weight to such purpose in considering the validity of the ordinance. This court, in the case of *Yick Wo* v. *Hopkins*, 118 U. S. 356, held that although an ordinance might be lawful upon its face and apparently fair in its terms, yet if it was enforced in such a manner as to work a discrimination against a part of the community for no lawful reason, such exercise of power would be invalidated by the courts" (195 U. S. p. 240).

There would seem to be no necessity of going further for utterances condemning the acts complained of in the present case. These are sufficient. Yet there are other cases sustaining the same doctrine. (*Yates* v. *Milwaukee*, 10 Wall. 497; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *City of Denver* v. *Rogers*, 46 Colo. 479, 104 Pac. 1042; *New Orleans* v. *Lagasse*, 114 La. 1055, 2 So. 828; *St. Louis* v. *Dreisoerner*, 147 S. W. (Mo.) 998; *San Antonio* v. *Salvation Army*, 127 S. W. (Tex.) 860; *Everett* v.

Council Bluffs, 46 Iowa, 66; *Railroad Company* v. *Joliet*, 79 Ill. 26, 39; *In re Quo Wong*, 13 Fed. 229; *The Stockton Laundry case*, 26 Fed. 611; *In re Sam Kee*, 31 Fed. 680; *In re Hong Wah*, 82 Fed. 623.)

In the decision in *City of Denver* v. *Rogers*, *supra*, it was said, among other things:

> "The question is whether a business which is not a nuisance *per se* can, without judicial inquiry, without a day in court, without the application of legal or equitable principles to the circumstances and conditions as they actually exist, or without the decision of judge or jury, when the facts are disputed, be declared and finally determined by the municipal legislation to be a nuisance."

It was held that that was done and parties were deprived of their property illegally, when the City of Denver passed an ordinance, which in terms prohibited a brickyard, where bricks were burned, within 1200 feet of any residence or public schoolhouse or park; the ordinance likewise declaring the same to be a nuisance.

So that before the business of the plaintiffs in error could be inhibited as being a nuisance, or otherwise objectionable so as to have it removed, a judicial inquiry would first have to be accorded the aggrieved parties, and it would have to be so found.

In the case of *St. Louis* v. *Dreisoerner*, *supra*, it was held that the city could not inhibit saw-mills because of the proximity of a park; that this would amount to an unconstitutional impairment of the value of the property used for that purpose. The ordinance was general, in-

hibiting saw-mills and the like, besides other industrial establishments within 600 feet of the park referred to. The Ordinance did not declare the forbidden industry to be a nuisance. Yet the court said:

> "It is settled law that a municipal corporation has no power by ordinance to declare that to be a nuisance which is not so in fact, or to suppress, *in part or in toto*, any business within its limits which is not a nuisance *per se*. *St. Louis Gunning Advertising Co.* v. *St. Louis*, 235 Mo. loc. cit. 147, 137 S. W. 929 and cases cited."

In the case of *New Orleans* v. *Legasse*, *supra*, it was held that a city has no authority to enact an ordinance directed against one or two particular establishments, which are neither nuisances *per se*, nor public nuisances.

The doctrine of the Colorado and Missouri Supreme Courts in the cases above cited is sustained by the ruling in *Yates* v. *Milwaukee*, 10 Wallace, 497, 505, where Mr. Justice Miller, for the court, declared that a municipal corporation could not declare that a nuisance which was not so or treat those as forbidden occupations, which in fact were not so. And the decision of this court in *Dobbins* v. *Los Angeles*, 195 U. S. 223, sustains the doctrine of the Louisiana Supreme Court. That a city council cannot legislate so as to discriminate against a business man or property owner is shown also by the decision in *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Eubank* v. *Richmond*, 226 U. S. 137, 143-144; *Chy Lung* v. *Freeman*, 92 U. S. 275, and other cases heretofore cited.

Although a law is fair on its face and impartial in its appearance, yet, if it is applied and administered with

an evil eye and unequal hand, so as to make unjust and illegal discrimination, it is within the protection of the Federal Constitution. (*Chy Lung* v. *Freeman*, 92 U. S. 275.)

The court is not here dealing with a case in which the parties are seeking to establish a livery stable in a residential part of the city, and have not yet invested their means in property buildings and improvements. *Russell* v. *St. Louis*, 22 S. W. 470, and *Fischer* v. *St. Louis*, 194 U. S. 361, were that character of cases. (See *Contra*, to those cases, however, *Phillips* v. *City of Denver*, 19 Colo. 179, 34 Pac. 902; *Crowley* v. *West*, 27 So. 53, 47 L. R. A. 652, 656; *Everett* v. *Council Bluffs*, 46 Iowa, 66; *Los Angeles* v. *Hollywood Cemetery*, 124 Cal. 344; *In re Whitwell*, 98 Cal. 73, 32 Pac. 870; *Grossman* v. *City of Oakland*, 30 Ore. 478.) Neither is it like cases where lotteries, saloons or pool rooms have been prohibited, either absolutely or conditionally, upon the theory that they are occupations of no practical use to society—of which class was *Murphy* v. *California*, 225 U. S. 623.

In the complaint mention was made of the unreasonable uncertainty which obtained as to the place where plaintiffs in error would be permitted to locate their business, if they could be compelled to remove it under the Ordinance complained of, and the impracticability of meeting the conditions so presented by reason of the permit system which obtained in the City of Little Rock on this subject. There are many cases which condemn such methods. (*Richmond* v. *Dudley*, 129 Ind. 112; *State* v.

Mahner, 43 La. Ann. 496; *Newton* v. *Belger*, 143 Mass. 598; *State* v. *Dubarry*, 44 La. Ann. 1117; *State* v. *Tenant*, 110 N. C. 609; *St. Louis* v. *Russell*, 22 S. W. 470.) The decision in *Eubank* v. *Richmond*, 226 U. S. 137, 143, discountenances and condemns laws which depend for their operation upon the whims or malice of other persons. In this case the attitude of the Little Rock authorities is shown to be biased and unfriendly by reason of the influence of local capitalists, to the prejudice of plaintiffs in error and their business and property interests.

In deciding this case the Supreme Court of Arkansas relied upon two decisions of this court to-wit: *Gundling* v. *Chicago*, 177 U. S. 183 and *Williams* v. *Arkansas*, 217 U. S. 79 (Printed Record, 18). Both of these decisions are in harmony with the cases cited in the preceding part of this argument. The regulations here in question are unreasonable and extravagant, and do arbitrarily interfere with and impair the value of the property of plaintiffs in error, without due process of law. Moreover they are aimed at plaintiffs in error in a way that is condemned by the decisions of this court and other courts.

The Supreme Court of Arkansas when it reversed the decree of the Pulaski Chancery Court should have, at least, remanded the cause to that court for a hearing on the allegations of the bill of complaint, and should not have dismissed the bill, and so denied to plaintiffs in error relief, if the allegations therein contained could be proved to be true. Having dismissed the bill of com-

plaint, under the circumstances, it left the plaintiffs in error without relief, although, it is submitted, they were entitled to protection under the Fourteenth Amendment to the Constitution of the United States.

Respectfully,

MORRIS M. COHN,
Attorney for Plaintiffs in Error.

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IN THE
Supreme Court of the United States.

LOUIS REINMAN AND LOUIS WOLFORT, PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF REINMAN STABLES, REINMAN-WOLFORT AUTOMOBILE COMPANY, AND C. L. KRAFT COMPANY,

v. No. 153

THE CITY OF LITTLE ROCK, ET AL.

REPLY BRIEF.

MORRIS M. COHN,
For Plaintiffs in Error.

CENTRAL PRINTING CO., LITTLE ROCK

IN THE

Supreme Court of the United States.

LOUIS REINMAN AND LOUIS WOLFORT, PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF REINMAN STABLES, REINMAN-WOLFORT AUTOMOBILE COMPANY, AND C. L. KRAFT COMPANY,

v. No. 153

THE CITY OF LITTLE ROCK, ET AL.

REPLY BRIEF.

The object of this reply brief is to call the attention of the court to the fact that the Supreme Court of Arkansas passed upon the case as if there was no other pleading than the bill of complaint, and held that to be insufficient. Therefore the argument for defendants in error can have no force, in which, on page 9 and succeeding pages of the brief of their counsel it is claimed that because an answer had been filed this ought also to be considered.

The record shows that in the Pulaski Chancery Court, from which an appeal was taken to the Supreme Court of Arkansas, a demurrer was sustained to the answer, and it was therefore held by that court to be

insufficient. (Printed record, 11-13.) Now the effect of the ruling of the State Supreme Court has been to deprive plaintiffs in error of the opportunity to try the issues set forth in their bill of complaint, if they be deemed sufficient in law to entitle them to a hearing. So far, as the case now stands in the record, the plaintiffs in error have had no opportunity to be heard on the allegations of their bill of complaint, if adequate to entitle them to a hearing thereon, because the Supreme Court of Arkansas has dismissed the complaint. The issues of constitutional law, under the Fourteenth Amendment to the Constitution of the United States, are thereby held to be without merit. And that leaves the issue which this court has to determine—whether the Supreme Court of Arkansas is right as to its ruling on the constitutional question.

The decision in the case of Thompson v. Jacoway, 97 Ark., 508, cited by opposing counsel (their brief, 9), has no application. That decision merely holds that if a plaintiff demurs to an answer, the demurrer may reach back to the complaint. It is true it is said that a defect in a complaint may be cured or aided by the answer, but that obviously means that if the defendant demurs to a complaint simultaneously with the filing of his answer, the answer may be read by the plaintiff in aid of his complaint, if defective, as a means of defeating the demurrer to the complaint. But that is not sought to be done here.

The record discloses that a demurrer had been filed to the bill of complaint in the trial court, on behalf of defendants, and that this was overruled. The Supreme Court in effect sustained this demurrer, and dismissed the bill. Therefore the answer counts for nothing in determining whether the bill of complaint contains sufficient to entitle plaintiffs in error to a hearing. We are not invoking the allegations of the answer in support of the allegations of our complaint, to cure any defects therein. We are standing solely upon the allegations of this bill of complaint, claiming that it is sufficient. If any one is entitled to invoke the doctrine of Thompson v. Jacoway, *Supra,* we are, not defendants in error.

We deem it unnecessary to add anything to what we said in our former brief, in reply to the brief of opposing counsel, on other points. It is sufficient to say, we submit, that they are entirely reconcilable with the contention we are making in this case.

Respectfully,

MORRIS M. COHN,

For Plaintiffs in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES

LOUIS REINMAN and LOUIS WOLFORT, Partners, Doing Business Under the Firm Name of Reinman Stables, Reinman-Wolfort Automobile Company, and C. L. KRAFT.....*Plaintiffs in Error*

v. No. 153.

THE CITY OF LITTLE ROCK *et al.*...*Defendants in Error*

ABSTRACT, BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

J. Merrick Moore,

J. W. & J. W. House, Jr.,

Attorneys for Defendants in Error.

DEMOCRAT PRINT. & LITHO. CO., LITTLE ROCK

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LIST OF CASES

IN THE

SUPREME COURT OF THE UNITED STATES

LOUIS REINMAN and LOUIS WOLFORT, Partners, Doing Business Under the Firm Name of Reinman Stables, Reinman-Wolfort Automobile Company, and C. L. KRAFT.....*Plaintiffs in Error*

v. No. 153.

THE CITY OF LITTLE ROCK *et al.*...*Defendants in Error*

ABSTRACT, BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

ABSTRACT.

In addition to the abstract which appears in the brief of plaintiffs in error, we wish to add the answer of the defendants in error, which the printed report shows was filed in the Pulaski Chancery Court. It is as follows:

> "On this day comes the defendants, and in answer to the compalint herein, state:
>
> They deny that plaintiffs carefully and properly conduct their business in accordance with the rules and regulations of the Board of Health of the State of Arkansas; they deny that for a number of years

last past said livery business has been conducted at said point without complaint as to sanitary conditions or in the manner in which the same was kept.

Defendants deny that said livery and sales stable business of said plaintiffs is not within the principal business or shopping district in the city of Little Rock, and they deny that there is very little business transacted in this vicinity; but they state that said livery and sales business of said plaintiffs is conducted in the heart of the business district of the city of Little Rock.

Defendants deny that plaintiffs have entered into leases for the grounds and improvements thereon, and deny that they have constructed a brick building facing on Louisiana street at a great cost to themselves; they deny that the building can not be used for other purposes, and deny that plaintiffs have made other large expenditures for improvements, and deny that they have entered into obligations covering large sums to promote their business, and deny that they will suffer any loss if compelled to abandon said site and cease to do business there and deny that there is no other available site in said city where said business can be profitably carried on.

Defendants deny that the city has encouraged for many years last past the establishment of said livery business at said locality and vicinity, as set out in the complaint, and deny that plaintiffs relied on such encouragement and made expenditures on said buildings; they deny that plaintiffs have exercised proper care in preventing any improper deposits or smells to occur in connection with their business, and deny that they use the most improved methods for cleanliness as such methods have become known. Defendants state that plaintiffs were never given any permit to build or conduct a stable at the present location by the city council.

Defendants deny that the city council of the city of Little Rock has the power or inclination to intimi-

date and discourage persons from continuing the livery business in said city, and deny that the ordinance in question was procured to be passed by the Gus Blass Dry Goods Company, The M. M. Cohn Company, Wolf Dry Goods Company, and the Little Rock Trust Company, with others interested in the purchase of the property from plaintiffs; they deny that the passage of said ordinance was in furtherance of the efforts of the above-mentioned parties to obtain the property of plaintiffs without due process of law, or without the right of eminent domain.

Defendants deny that the buildings of plaintiffs, on account of their construction, are unsuited to other business; deny that if plaintiffs are prohibited from carrying on the livery stable business in said buildings that said property will be taken from them without proper compensation or without their day in court; defendants deny that the method of fining provided is an effort to do indirectly under the guise of the police power what the city has not the right to do directly, and denies that said ordinance was aimed at plaintiffs directly, and denies that said ordinance is discriminative and unreasonable, and not warranted by law.

Defendants deny that the effect of said ordinance renders the carrying on of plaintiff's business practically impossible; deny that said business, in drawing customers toward the locality where said business has heretofore been carried on, largely contributed and contributes now to the activity of said section as a business district, and creates custom for the business houses on Main street; deny that the enforcement of said ordinance would deprive the plaintiffs of their property and business without compensation and due process of law.

And for further answer, the defendants state: That the city council, in passing said ordinance, was actuated by the desire and obligation to protect citizens of Little Rock; that said ordinance was passed for the purpose of promoting the health and prosperity of the citizens and to increase the value of the

property in said district; that it was established with the utmost good faith and with the belief that said livery stables in said district were conducive to sickness and inconvenient and ill health of the citizens and damaging to the property in that vicinity.

Defendants state that said district composes the greatest shopping districts in the entire State of Arkansas; that it contains the largest and best hotels in the State, and the district encompasses the most valuable real estate in the entire State; that said stable business is conducted in a careless manner, and that it is nothing unusual in connection with said sale stables to have from fifty to one hundred head of horses and mules driven through the principal streets to said stables; that there is always an offensive odor coming from said stables to the great detriment of the tenants in the property adjoining and to the shoppers who go within this district and hotel guests; that said stables being in such densely populated part of the city produces disease, making that section extremely unwholesome and unhealthy; that said stables retard the growth and prosperity of this district and depreciates the value of the adjoining property by at least 20 or 25 per cent, and prevents improvements from being made thereon on account of the stables conducted in said district.

Defendants further state that the conducting of livery stables within the prescribed district is inconvenient, dangerous, offensive and unhealthy to the inhabitants of said district, and to the shoppers thereof and to the community at large, for the reason above stated, and because the livery stables afford the most favorable condition for the breeding of flies and other obnoxious insects which spread disease and contagion; that the conducting of said livery stables in said district is dangerous to the morals, health and safety of the inhabitants for the reason above mentioned; that the fire risk is greatly increased in said district by said livery stables because of the large amount of inflammable material that neces-

sarily accumulates, and which is necessary for carrying on said livery stables.

Wherefore, defendants having fully answered, pray that said complaint be dismissed, and for all other and proper relief that they may be entitled to." (Printed record, 8, 9, 10.)

To this answer a demurrer was filed, which was sustained, and is as follows:

"Come the plaintiffs and except to the sufficiency of and demur to the answer herein and for cause, state:

That the answer is insufficient in law to raise an issue of fact for this court on the justification of authority assumed by defendant, the city of Little Rock, to pass, and the defendants to enforce the ordinance complained of in plaintiffs' complaint.

That said answer does not show authority to pass or enforce such an ordinance by defendants, or either of them.

That said answer renders no issue which this court will hear in response to plaintiffs' complaint.

That said answer does not state facts sufficient to constitute a defense to plaintiffs' complaint." (Printed Record, 11.)

BRIEF.

I.

This case should not be considered on the complaint alone, but it should be considered on the complaint, the answer and the demurrer, as it was considered by the Supreme Court of the State of Arkansas.

Thompson v. Jacoway, 97 Ark. 508.

II.

The allegations of fraud in the complaint, on the part of the city council in passing this ordinance, is not to be considered by this court: First, because the answer denied this allegation and the demurrer to the answer admitted this allegation in the answer; second, the decision in this case by the Supreme Court of the State of Arkansas shows that in the State of Arkansas the question of fraud, with reference to ordinances of the city council, is not a question that can be inquired into, and this decision shows on its face that that is a rule of law in this State and the Supreme Court of the State having passed on that question, it is not open to this court to review.

Slaughter House Cases, 16 Wallace 36.

Crowley v. Christensen, 137 U. S. 86.

Fischer v. St. Louis, 194 U. S. 361.

III.

The ordinance in question is purely a regulation and not a prohibition.

St. Louis v. Russell, 22 S. W. 470.

Russell v. Beattie, 16 Mo. App. 137.

Ex parte Lacey, 49 Am. St. R. 93.

Barbier v. Connolly, 113 U. S. 27.

Slaughter House Cases, 16 Wallace 36.

Soon Hing v. Crowley, 113 U. S. 703.

Mugler v. Kansas, 123 U. S. 623.

Beer v. Mass., 97 U. S. 32.

Lawton v. Steele, 152 U. S. 133.

Gundling v. Chicago, 177 U. S. 183.

Fischer v. St. Louis, 194 U. S. 361.

C. B. & Q. Ry. v. Ill. Drainage Co., 200 U. S. 561, and the cases therein cited.

IV.

The fact that the livery stable is not a nuisance *per se*, does not prevent a regulation on the part of the city council. This ordinance was intended as a regulation, and not as a prohibition.

Canfield v. U. S., 167 U. S. 518.

Lawton v. Steele, 152 U. S. 136.

Barbier v. Connolly, 113 U. S. 27.

Kidd v. Pearson, 128 U. S. 1.

Fischer v. St. Louis, 194 U. S. 361.

Austin v. Tenn., 179 U. S. 343.

Powell v. Pa., 127 U. S. 678.

Murphy v. Cal., 225 U. S. 623.

V.

There can be no estoppel which would prevent the city from passing any ordinance for the protection of public health, morals and prosperity of the citizens.

Mugler v. Kansas, 123 U. S. pages 664-670.

ARGUMENT.

I.

Plaintiffs in error contend that the determination of the merits of this case should be on the complaint alone. We submit that this is not correct. It has not been the practice of this court to deal in technicalities, but it deals with a case upon its merits.

This case was submitted upon the complaint, the answer and the demurrer to the answer, and by the demurrer to the answer, plaintiffs in error admitted all the facts therein, and stood on the proposition that the city of Little Rock had no power to pass the ordinance in question. The effect of the demurrer to the answer has been settled in the State of Arkansas in the case of Thompson v. Jacoway, 97 Ark. 508, and at page 511, the following language is used:

> "It is urged by counsel for defendants that the complaint herein was defective as to the defendant Collier, and was itself subject to a demurrer; and that the demurrer filed to the answer related back to the complaint, and that the demurrer, being thus taken to the complaint, should have been sustained. It is claimed that in the complaint it was alleged that the mortgage upon which this suit is based provided that the property therein described should be sold and the proceeds thereof applied to the note sued on before defendant Collier should be required to pay any part thereof, and that it was not alleged in the complaint that this had been done. It is true that when a demurrer is filed to the answer its effect is to search all prior pleadings, and it operates, not only against the answer to which it is interposed, but it is also taken as a demurrer to the complaint upon

which the action is instituted; and if that pleading contains a fatal defect, it should be sustained as a demurrer to such complaint. Carlock v. Spencer, 7 Ark. 12; Wade v. Bridges, 24 Ark. 569; Yell v. Snow, 24 Ark. 555; Ward v. Terry, 30 Ark. 385; Bruce v. Benedict, 31 Ark. 305.

But a defect in the complaint may be aided and cured by an answer. If a complaint is defective because it does not make sufficient allegations, then it is aided by an answer which itself makes the allegations in which the complaint is deficient; and this cures the complaint. As is said in the case of C., O. & G. Ry. v. Doughty, 77 Ark. 1: 'A defect in pleading is aided if the adverse party plead over to or answer the defective pleading in such a manner that an omission or informality therein is expressly or impliedly supplied or rendered formal or intelligible.' Knight v. Sharp, 24 Ark. 602; Pindall v. Trevor, 30 Ark. 249; Davis v. Hare, 32 Ark. 386; Webb v. Davis, 37 Ark. 551; Ogden v. Ogden, 60 Ark. 70; Hess v. Adler, 67 Ark. 444."

This case shows that when the demurrer was filed the whole record was considered and judgment was rendered on the whole record, which was done in the case at bar. In the opinion of the Supreme Court of Arkansas in the case at bar appears the following: "The city council doubtless passed the ordinance to meet and remedy a condition actually existing." This tends to show that that court considered all the material allegations in the complaint as being denied and the denial admitted. The only question was whether or not the city council had the power to pass such an ordinance, and the Supreme Court of the State of Arkansas held that such an ordinance was not in violation of any State or Federal law, or of the Constitution, but was merely a police regulation, and was an effort upon the part of the city to regulate livery sta-

bles in the city of Little Rock, and that such a regulation was necessary for the comfort, health and prosperity of the State. This rule has been upheld by many decisions of this court and by the Supreme Court of Arkansas.

II.

Plaintiffs in error urge that this case should be reversed, because, taking the complaint alone, it shows that the ordinance was passed by fraud and corrupt influences. But, in this argument, learned counsel overlook the fact that the demurrer was filed to the answer, which denied this allegation made in the complaint, so that this question was not before the court.

Admitting, however, for the purpose of this argument, that the case should be considered on the complaint alone; then the decision of the Supreme Court of Arkansas was to the effect that there can be no going behind an ordinance of the city council on the question of fraud, and that the question is not one which can be inquired into. The opinion of the Supreme Court of Arkansas uses the following language:

> "The city council doubtless passed the ordinance to meet and remedy a condition actually existing." (Printed Record, 21.)

And, also, the following:

> "The ordinance in question does not attempt to prohibit the carrying on of the business, but only to restrict and limit it to a certain defined territory, or, rather, to prohibit the operation of it within the small prescribed area or district included in the ordinance. It does not amount to a prohibition of the business,

nor was it necessary to show that the business, as conducted, amounted to a nuisance before it was subject to the provisions of this ordinance regulating it. The power to regulate is expressly given by the statute and reasonably includes, as already said, the right to limit and confine the operation of such business to certain territory and to prohibit the carrying of it on in certain other territory, which the city council, by the authority of the State, was left the power to select in the exercise of a reasonable discretion. The power having been vested in the city and duly exercised by its council in the passage of the ordinance, the question is settled thereby for the necessity of the regulation. It is not unreasonable or an undue restraint upon a lawful trade or business, nor an improper restraint upon the lawful and beneficial use of private property." (Printed Record, 21, 22.)

The decision of the Supreme Court of the State of Arkansas, we submit would be final on this point.

In Slaughter House Cases, 16 Wallace 36, at page 66, the court said:

"It may, therefore, be considered as established, that the authority of the Legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the Constitution of that State or in the amendments to the Constitution of the United States, adopted since the date of the decisions we have already cited."

In Crowley v. Christensen, 137 U. S. 86, at page 92, the court said:

"The Constitution of California vests in the municipality of the city of San Francisco, the right to make 'all such local police, sanitary and other regulations as are not in conflict with general laws.' The Supreme Court of the State has decided that the ordinance in question, under which the petition was ar-

rested and held in custody, was thus authorized and is valid. The decision is binding upon us unless some inhibition of the Constitution or of a law of the United States is violated by it."

Fischer v. St. Louis, 194 U. S. 361.

III.

There can be no question of the character of the district in which these stables are located; the answer sets up that they are located in the heart of the most valuable property in the State of Arkansas; that the district includes the greatest shopping and hotel district in the State.

Kirby's Digest for the State of Arkansas provides as follows:

"Sec. 5437. All municipal corporations shall have general powers and privileges, and be subjected to rules and restrictions by this act prescribed."

"Sec. 5454. The city government shall have the power to regulate all carts, wagons, drays, hackney coaches, omnibuses and ferries and every description of carriages which may be kept for hire and all livery stables."

"Sec. 5438. The city government shall have the power to prevent injury or annoyance within the limits of a corporation from anything dangerous or unhealthy."

"Sec. 5461. The city council shall have the power to make and publish such by-laws and ordinances, not inconsistent with the laws of the State, as shall seem necessary to provide for the safety, preserve the health, promote the pros-

perity and improve the morals, order and comfort of such city and the inhabitants thereof."

The only question then is whether or not this ordinance is a regulation that is a reasonable one. The city council of the city of Little Rock thought so and the Supreme Court declares that the ordinance was a valid exercise of the police power, and declared the ordinance in question to be a regulation of livery stables, in the following language:

> "The ordinance in question does not attempt to prohibit the carrying on of the business, but only to restrict and limit it to a certain defined territory, or rather to prohibit the operation of it within the small prescribed area or district included in the ordinance. It does not amount to a prohibition of the business, nor was it necessary to show that the business, as conducted amounted to a nuisance before it was subject to the provisions of this ordinance regulating it. The power to regulate is expressly given by the statute and reasonably includes, as already said, the right to limit and confine the operation of such business to certain territory and to prohibit the carrying of it on in certain other territory, which the city council, by the authority of the State, was left the power to select in the exercise of a reasonable discretion. The power having been vested in the city and duly exercised by its council in the passage of the ordinance, the question is settled thereby for the necessity of the regulation. It is not unreasonable or an undue restraint upon a lawful trade or business nor an improper restraint upon the lawful and beneficial use of private property." (Printed Record, 20-21.)

The decision of the Supreme Court of Arkansas is binding upon this court, unless the ordinance violates some provision of the Constitution of the United States. It is claimed by plaintiffs in error that this ordinance violates the Four-

teenth Amendment. Unless this ordinance is so utterly inconsistent, unreasonable and extravagant in its nature and purpose that the property and personal rights of a person or citizen are unnecessarily and in a manner wholly arbitrary, interfered with are destroyed without due process of law, they do not extend beyond the power of the State, and forms no subject for Federal interference. 177 U. S. 183-188, Gundling v. Chicago. Can this court say the ordinance in question is one of this character, when the record shows that the stables are located in a densely populated district, and that their existence is deleterious to the health and obnoxious to the senses of the inhabitants of the locality, reducing the value of the adjoining property and increasing the fire hazard.

An ordinance exactly like this was upheld in case of St. Louis v. Russell, 22 S. W. 470, the court holding that the city had the power to confine livery stables to certain localities within the limits of the city. This rule was also established in the case of Russell v. Beattie, 16 Mo. App. 137; *Ex parte* Lacey, 49 Am. St. R. 93, and at page 94 the court said:

> "Conceding the business covered by the provisions of this ordinance not to constitute a nuisance *per se*, and to stand upon different grounds from powder factories, street obstructions and the like, still the case is made no better for petitioner. This is not a question of nuisance *per se*, and the power to regulate is in no way dependent upon such conditions. Indeed, as to nuisances *per se*, the general laws of the State are ample to deal with them. But the business here involved may be properly classed with livery stables, laundries, soap and glue factories, etc., a class of business undertakings in the conduct of which police and sanitary regulations are

made to a greater or less degree by every city in the country. And in this class of cases it is no defense to the validity of regulation ordinances to say: I am committing no nuisance, and I insist upon being heard before a court or jury upon that question of fact."

In Barbier v. Connolly, 113 U. S. 27, an ordinance of a similar character was involved and the following language was used at page 30:

> "That fourth section, so far as it is involved in the case before the judge, was simply a prohibition to carry on the washing and ironing of clothes in public laundries and wash-houses, within certain prescribed limits of the city and county, from 10:00 o'clock at night until 6:00 o'clock in the morning of the following day. The prohibition against labor on Sunday is not involved. The provision is purely a public regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies. And it would be an extraordinary usurpation of the authority of a municipality, if a Federal tribunal should undertake to supervise such regulations."

The preamble of the ordinance in question is as follows:

> "Whereas, the conducting of a livery stable business within certain parts of the city of Little Rock, Arkansas, is detrimental to the health, interest and prosperity of the city of Little Rock. Therefore, 'Be it ordained by the city council of the city of Little Rock.'" (Printed Record, 17.)

This shows that the city council had taken the matter up and considered the advisability and necessity of such an ordinance, and after due deliberation it considered there was, and this is conclusive, unless the ordinance contravenes some clause of the Constitution, and we submit that this is not the case.

A city certainty has the right, under police power, to prohibit the carrying on of livery stables in certain described limit on account of the health, morals and prosperity of the citizens, even though an individual may suffer by the operation of that law.

Slaughter House Cases, 16 Wallace 36.

Barbier v. Connolly, 113 U. S. 27.

Soon Hing v. Crowley, 113 U. S. 703-708.

Crowley v. Christensen, 137 U. S. 86.

Mugler v. Kansas, 123 U. S. 623, 665, 668.

Beer v. Mass., 97 U. S. 32.

Lawton v. Steele, 152 U. S. 133-136.

Gundling v. Chicago, 177 U. S. 183-188.

Fischer v. St. Louis, 194 U. S. 361-369.

C., B. & Q. Ry. v. Ill. Drainage Co., 200 U. S. 561, 584, 585, 592, and the cases therein cited.

IV.

The fact that a livery stable is not a nuisance *per se*, does not prevent a regulation on the part of the city council, as was said in the case of Canfield v. U. S., 167 U. S. 518, which is as follows:

> "And it can not be said judicially that volatile, inflammable, explosive and bad-smelling gas is not within the category of things which interfere with the public safety, welfare and comfort, and therefore be-

yond the reach of the police power. The exercise of this power is not confined to the regulation of only such interference with the public welfare and comfort as come strictly within the common law definition of a 'nuisance.'"

In Lawton v. Steele, 152 U. S. 136, the court said:

"Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the Legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." (Appellants' brief, 3-7.)

Barbier v. Connolly, 113 U. S. 27.

Kidd v. Pearson, 128 U. S. 1.

Fischer v. St. Louis, 194 U. S. 361.

Austin v. Tenn., 179 U. S. 343.

Powell v. Pa., 127 U. S. 678.

Murphy v. Cal., 225 U. S. 623.

V.

Learned counsel for plaintiffs in error insist that the city of Little Rock is estopped from passing the ordinance in question. We submit the city is not estopped from passing any police regulation. The statutes of Arkansas above referred to give the city council power to regulate livery stables; these statutes were in full force and effect at the time plaintiffs in error began business up to the time the ordinance in question was passed.

This question is discussed fully in the case of Mugler v. Kansas, 123 U. S., pages 664-670.

Therefore, we respectfully submit that the decision of the Supreme Court of the State of Arkansas should be affirmed.

J. Merrick Moore,

J. W. & J. W. House, Jr.,

Attorneys for Defendants in Error.

REINMAN *v.* CITY OF LITTLE ROCK.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 153. Argued January 22, 1915.—Decided April 5, 1915.

The decision of the state court of last resort that a municipal ordinance is within the scope of the power conferred on the municipality by the legislature is conclusive upon this court.

Where the state court has held that an ordinance is within the power conferred on the municipality it must be regarded as a state law within the meaning of the Federal Constitution.

Any enactment, from whatever source originating, to which a State gives

the force of law is a statute of the State within the meaning of § 237, Jud. Code, conferring jurisdiction on this court.

Even though a livery stable is not a nuisance *per se* it is within the police power of the State to regulate the business, and to declare a livery stable to be a nuisance, in fact and in law, in particular circumstances and particular places; if such power is not exercised arbitrarily or with unjust discrimination it does not infringe upon rights guaranteed by the Fourteenth Amendment.

The opinion of the state court is to be interpreted in the light of the issue as framed by the pleadings.

Where averments of facts in the complaint are contradicted by the answer, and the expression used by the court "dismissed for want of equity" may, under the practice of the state court, as in Arkansas, indicate dismissal on the merits as distinguished from a dismissal based upon a formal defect or fault—this court assumes that the state court adopted the facts set up in the answer, that being the basis of facts which would most clearly sustain its decision.

The ordinance of the City of Little Rock, Arkansas, making it unlawful to conduct the business of a livery stable in certain defined portions of that city, is not unconstitutional as depriving an owner of a livery stable already established within that district of his property without due process of law or as denying him equal protection of law.

107 Arkansas, 174, affirmed.

PLAINTIFFS in error filed their bill of complaint in the Pulaski County Chancery Court, a state court of general chancery jurisdiction, praying an injunction against the City of Little Rock, its mayor and other officers, to restrain them from enforcing an ordinance passed by the city council to regulate livery stables. The ordinance recites that "The conducting of a livery stable business within certain parts of the City of Little Rock, Arkansas, is detrimental to the health, interest and prosperity of the City," and it is ordained that it shall be unlawful to conduct or carry on that business within the area bounded by Center, Markham, Main, and Fifth Streets, under penalties prescribed. Plaintiffs include a firm that conducts a livery and sale stable business, and a corporation that carries on a general livery stable business, within the de-

fined area. It is averred that the businesses are and have been for many years conducted in brick buildings, in a proper and careful manner, and without complaint as to sanitary conditions; that plaintiffs during the progress of their business have been compelled to enter into leases for the grounds and improvements and to construct brick buildings at great cost, useful for no other purpose, and that these and other large expenditures made for improvements will be lost if they are compelled to cease to do business there; that there is no other available site in the city where such business can be profitably carried on and where plaintiffs have assurance that they may remain without molestation; that these matters are matters of public notoriety, and the establishment of the business in that locality has been encouraged by the city, and upon the strength of such encouragement the buildings were constructed and expenditures made; that the passage of the ordinance was procured by named parties (not made defendants) who desired to purchase the property of plaintiffs; that plaintiffs have tried to obtain another location for their business outside of the prohibited district, but are unable to do so except with extravagant outlay which they are unable to make; and that the action of city council in prohibiting the carrying on of any livery stable business in the locality mentioned is unreasonable, discriminatory, not warranted by law or the charter of the City, and in contravention of those provisions of the Fourteenth Amendment respecting due process of law and the equal protection of the laws. A verifying affidavit and a copy of the ordinance were attached as exhibits.

Defendants demurred, upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The trial court overruled the demurrer and granted a temporary restraining order. Defendants answered, denying the material averments of the bill, and asserting that the ordinance was passed in good faith

for the purpose of promoting the health and prosperity of the citizens, and in the belief that said livery stables in said district were conducive to sickness and inconvenience and ill health to the citizens, and were damaging to the property in that vicinity; also, "that said district composes the greatest shopping district in the entire State of Arkansas; that it contains the largest and best hotels in the State, and the district encompasses the most valuable real estate in the entire State; that said stable business is conducted in a careless manner, and that it is nothing unusual in connection with said sale stables to have from fifty to one hundred head of horses and mules driven through the principal streets to said stables; that there is always an offensive odor coming from said stables, to the great detriment of the tenants in the property adjoining and the shoppers who go within this district, and hotel guests; that said stables being in such densely populated part of the city produce disease, making that section extremely unwholesome," etc.

Plaintiffs excepted and also demurred to the answer as insufficient in law to raise an issue of fact upon the authority assumed by the City to pass the ordinance, and as stating no facts sufficient to constitute a defense. The cause was then heard, upon the complaint and exhibits, the answer, and the demurrer; the demurrer was sustained, and, defendants declining to plead further, it was decreed that the temporary restraining order be made perpetual.

Defendants appealed to the Supreme Court of Arkansas, which court, on February 24, 1913, made a decree reversing the decree of the lower court, with costs, and remanding the cause with directions to dismiss the complaint for want of equity. The decree of reversal recited: "This cause came on to be heard upon the transcript of the record of the Chancery Court of Pulaski County, and was argued by solicitors, on consideration whereof it is the opinion of the Court that there is error in the proceedings and

decree of said Chancery Court in this cause, in this: Said court erred in granting the relief prayed for in the complaint, whereas the same is without equity and should have been dismissed." It was therefore ordered and decreed that the decree of the Chancery Court be reversed, "and that this cause be remanded to said Chancery Court with directions to dismiss the complaint of the appellees for want of equity." Upon the same day an opinion was filed in the Supreme Court, expressing the grounds of the decision. 107 Arkansas, 174.

Thereafter, a petition for rehearing was filed, and by leave of the court was submitted at a later date with a supporting brief. Among the averments of the petition were the following: "That the effect of the ruling of this Honorable Court is to deprive the appellees of the opportunity of presenting evidence to sustain those of the allegations of the Complaint as are denied by the said answer, for the said ruling orders the dismissal of the said complaint and does not remand the cause so that appellees may present evidence to sustain the allegations of their bill of complaint bearing on the question whether said ordinance and permit system does or does not amount to a deprivation of property and a denial of the equal protection of the laws, within the provisions of the Fourteenth Amendment to the Constitution of the United States, as well as the provisions of the constitution of the State of Arkansas. That unless the appellees are given an opportunity to introduce evidence as aforesaid the said answer may be taken as conclusive against them; that upon the finding that said demurrer was improperly sustained the cause should have been remanded to take evidence as to the said constitutional questions, including the use and abuse of the said permit system by said City." The petition for rehearing was taken under advisement, and at a later date overruled, without opinion. The present writ of error was then sued out.

Mr. Morris M. Cohn for plaintiff in error.

Mr. J. Merrick Moore for defendant in error.

MR. JUSTICE PITNEY, after making the foregoing statement, delivered the opinion of the court.

The decision of the state court of last resort is conclusive upon the point that the ordinance under consideration is within the scope of the powers conferred by the state legislature upon the city council of Little Rock. It must therefore be treated, for the purposes of our jurisdiction, as an act of legislation proceeding from the law-making power of the State; for a municipal ordinance passed under authority delegated by the legislature is a state law within the meaning of the Federal Constitution; and any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State within the meaning of Judicial Code, § 237, which confers jurisdiction upon this court. *Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 548, 555, and cases cited.

Therefore the argument that a livery stable is not a nuisance *per se*, which is much insisted upon by plaintiffs in error, is beside the question. Granting that it is not a nuisance *per se*, it is clearly within the police power of the State to regulate the business and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law, provided this power is not exerted arbitrarily, or with unjust discrimination, so as to infringe upon rights guaranteed by the Fourteenth Amendment. For no question is made, and we think none could reasonably be made, but that the general subject of the regulation of livery stables, with respect to their location and the manner

in which they are to be conducted in a thickly populated city, is well within the range of the power of the state to legislate for the health and general welfare of the people.

While such regulations are subject to judicial scrutiny upon fundamental grounds, yet a considerable latitude of discretion must be accorded to the law-making power; and so long as the regulation in question is not shown to be clearly unreasonable and arbitrary, and operates uniformly upon all persons similarly situated in the particular district, the district itself not appearing to have been arbitrarily selected, it cannot be judicially declared that there is a deprivation of property without due process of law, or a denial of the equal protection of the laws, within the meaning of the Fourteenth Amendment. *Slaughter House Cases*, 16 Wall. 36, 62; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 667; *Barbier* v. *Connolly*, 113 U. S. 27, 30; *Soon Hing* v. *Crowley*, 113 U. S. 703, 708; *Lawton* v. *Steele*, 152 U. S. 133, 136; *Gundling* v. *Chicago*, 177 U. S. 183, 188; *Williams* v. *Arkansas*, 217 U. S. 79, 87; *Cronin* v. *People*, 82 N. Y. 318, 321; *In re Wilson*, 32 Minnesota, 145, 148; *City of St. Louis* v. *Russell*, 116 Missouri, 248, 253.

The only debatable question arises from the contention that under the particular circumstances alleged in the complaint, viz: that plaintiffs in error have conducted the livery stable business for a long time in the same location and at large expense for permanent structures, and the removal to another location would be very costly, and since (as the complaint alleges) their stables are in all respects properly conducted, this particular ordinance must be deemed an unreasonable and arbitrary exercise of the power of regulation. But these averments of fact are contradicted by the answer, and so we are confronted with the question: Upon what basis of fact is this matter to be determined? Plaintiffs in error insist that it is to be

decided upon the basis of the averments contained in their complaint, because the Supreme Court ordered the complaint to be dismissed for want of equity. But it seems that in the practice of the courts of Arkansas, as elsewhere, the expression "dismissed for want of equity" is employed to indicate a decision upon the merits as distinguished from one based upon a formal defect or default; and that it applies as well where on final hearing it is found that the averments of the complaint are not true in fact, as where those averments do not upon their face show a sufficient basis of fact for the granting of the relief sought. *Meux* v. *Anthony*, 11 Arkansas, 411, 422, 424; *Smith* v. *Carrigan*, 23 Arkansas, 555; *McRae* v. *Rogers*, 30 Arkansas, 272.

Upon the face of this record it appears that all the material averments of the bill were denied by the answer, and that the latter pleading also showed particular reasons why it was proper for the city council to prohibit the further maintenance of livery stables within the limited district described in the ordinance. It was averred that that district is in a densely populated and busy part of the City of Little Rock, and that the stables are conducted in a careless manner, with offensive odors, and so as to be productive of disease. Plaintiffs did not contradict this, but demurred to the answer as insufficient in law, and the cause was heard in the trial court upon the complaint and exhibits, the answer, and the demurrer. The demurrer being sustained, and defendants declining to plead further, a perpetual restraining order followed in due course. Upon the removal of the cause to the Supreme Court on defendant's appeal it was heard there, as appears from the decree rendered by that court, "upon the transcript of the record of the Chancery Court of Pulaski County." That record includes not only the complaint, but the answer and demurrer. The Supreme Court in its opinion made no statement of the facts upon which it proceeded

to judgment, and did not intimate that it ignored the effect of the answer and confined itself to the averments of the bill alone. It is true that broad reasoning was employed; but, upon familiar principles, the opinion is to be interpreted in the light of the issue as framed by the pleadings. Besides, the petition for rehearing especially set up that the effect of the ruling of the Supreme Court was to deprive plaintiffs of the opportunity of presenting evidence to sustain those allegations of the complaint that were denied by the answer, that unless they were given an opportunity to introduce evidence the answer might be taken as conclusive against them, and that the cause ought to have been remanded to take evidence, etc. The fact that the Supreme Court denied the rehearing without giving reasons is at least consistent with the theory that plaintiffs had properly interpreted the meaning of the decree as entered, and that it correctly expressed the intent and the purpose of the court.

By § 25 of the Judiciary Act of 1789 (ch. 20, 1 Stat. 86) it was provided: "No other error shall be assigned or regarded as a ground of reversal . . . than such as appears on the face of the record." Under this Act, it was uniformly held that in reviewing the judgments of state courts (in States other than Louisiana, where the opinion formed a part of the record), this court could not look into the opinion to ascertain what was decided. In the amendatory act of February 5, 1867 (ch. 28, § 2, 14 Stat. 386), the words above quoted were omitted, and because of this it has since been held that this court is not so closely restricted as before to the face of the record to ascertain what was decided in the state court, and may examine the opinion, when properly authenticated, so far as may be useful in determining that question. This is recognized in paragraph 2 of our eighth rule. "But after all," said Mr. Justice Miller, speaking for the court in *Murdock* v. *City of Memphis*, 20 Wall. 590, 633, 634,

"the record of the case, its pleadings, bills of exceptions, judgment, evidence, in short, its record, whether it be a case in law or equity, must be the chief foundation of the inquiry; and while we are not prepared to fix any absolute limit to the sources of the inquiry under the new act, we feel quite sure it was not intended to open the scope of it to any loose range of investigation."

If the record, including the opinion, leaves it a matter of doubtful inference upon what basis of fact the state court rested its decision of the Federal question, it seems to us very plain, upon general principles, that we ought to assume, so far as the state of the record permits, that it adopted such a basis of fact as would most clearly sustain its judgment. Hence, in the present case, we ought to and do assume that the Arkansas Supreme Court acted upon the basis of the facts set up in the answer of the City, treating them as sufficiently substantiated by the effect of the demurrer in admitting them to be true so far as properly pleaded. This being so, there is, as we have already remarked, no reasonable question of the validity of the ordinance, and the judgment of the Supreme Court is

Affirmed.